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Impeachment Trial Committee

Impeachment of Judge G. Thomas Porteous, Jr., U.S. District Judge For the Eastern District of Louisiana

Volume V

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P R O C E E D I N G S (8:13 a.m.)

CHAIRMAN MC CASKILL: Good morning, everyone. We apologize for being 15 minutes late, but we have seven members on the committee so we may begin. And I believe Judge Porteous, it's the appropriate time for you to call your first witness.

MR. TURLEY: Thank you, Madam Chair. We call Mr. John Mamoulides.

Whereupon,

JOHN M. MAMOULIDES

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Good morning, Mr. Mamoulides.

A Good morning.

Q As you know, I'm Jonathan Turley, one of the lawyers representing Judge Porteous. Can we start by asking you to first state your full name for the record.

A John M. Mamoulides.

Q I'm going to ask you to begin with by giving you a little bit of your background in Louisiana as an attorney.

CHAIRMAN MC CASKILL: Mr. Mamoulides, would you please turn on your microphone? There should be a button on the base of it. And speak into it, please.

THE WITNESS: 1, 2, 3.

CHAIRMAN MC CASKILL: It's still not on. Can you help him?

THE WITNESS: Now can you hear me?

CHAIRMAN MC CASKILL: Now we go.

BY MR. TURLEY:

Q Can we begin by asking you a little bit about your background as an attorney in Louisiana. What is your background as an attorney and prosecutor?

A Well, I graduated from Tulane Law School in 1960 and was practicing just general practice of law in Jefferson Parish for about six years, and then got involved as an assistant district attorney, the DA's office, and my boss was Frank Langridge who had been the DA for 20, 30 years, and handled misdemeanors in that court with him.

Started and then worked there probably a year or so, and eventually worked into handling felony cases and began doing more and more work. I never intended to be a criminal lawyer. I thought

I'd always be a civil. But it kind of grew on me, and so I stayed doing that work until sometime in 1968, I think.

I was promoted by Mr. Langridge to executive assistant and began doing more and more work in the area of organizing the office and prosecution.

In 1972, Mr. Langridge retired and I was named as his replacement by Governor McKeithen at that time, and had an election that year, I think I was named DA in April. And in August I was elected for the full term, which is a six-year term, in '72. And got elected three more times after that, for six-year terms.

So when I retired in '96, I had 24 years as DA and six years as an assistant. I had 30 years and retired. And one of my assistants, who was my first assistant at the time, became the DA under the law. The law had changed. And he ran against another ex-one of my assistants, who is Paul Connick, who won the race between the two of them. And Paul Connick is now still the DA.

Q Excellent. So if I get the math correct, then, you were 30 years total with the district attorney's office, then?

A Yes.

Q And is it correct, then, that you began with the district attorneys in 1972, retired in 1996?

A I began in the office in, I think, '68 -- or '66, I guess it was, as an assistant part-time, and then stayed until I finished in 1996.

Q So as district attorney, that began in 1972?

A '72. DA from '72, in April I think I got appointed.

Q So is it true to say you were district attorney during the entire period of when Judge Porteous was both a prosecutor and a state judge, since he took the bench in '94?

A Yes, I think Porteous -- I met Porteous in 1972. My office was working with the Attorney General's Office of the state. And he had sent down two young lawyers to assist us in some -- a case, one of them was Tom Porteous and one of them was a fellow named Mac Gauchet. And one of them stayed, we were hiring. And I hired Tom as assistant at that point.

And he was with me until he ran for district judge, which was probably 12 years or

something later.

Q Just to wrap up on your background, did you also have occasion to be appointed by the governor to the prison overcrowding policy task force?

A Yes, I think I was appointed to many task forces. The death penalty task force, and a bunch of other things. And that was probably one, because we had a serious overcrowding going on all over the state, in the jails.

And I don't remember any of the specific meetings, but there was times when we would try to get the sheriffs to work closely with the state corrections department, which ran the state prisons, and make sure that all of -- they had all of them they could find and do the right thing to keep the overcrowding down.

Because we were constantly being hit with the federal courts on overcrowding.

Q I'm going to return to that in a second, but I'd like to pick up on what you had said earlier, about when you first met Judge Porteous. Was that around '72, '73 that you first met him?

A I'm going to guess '72, end of '72 sometime, might have been '73, he had come over and

was assigned to help work with us, with my staff from the Attorney General -- State of Louisiana Attorney General's Office, Billy Guste, two of them, he and a fellow named Mac Gauchet. And we offered him a job, he wanted to stay. We hired him as an assistant DA and put him in screening and misdemeanor stuff until he got some experience.

Q Is it true, then, that he stayed an assistant district attorney with you until he became a judge?

A Yes. I think he -- my recollection is that he was an assistant DA until the time that he decided to run for judge. That was a state district court judgeship.

Q And you said until he got some experience. Did he eventually become one of your more seasoned prosecutors?

A Oh, yes. He did very well with prosecution, and he was one of the -- he started off with misdemeanors and then he was assigned to work with one of my supervisors at that time. And I had some policies that the DAs, assistant DAs would work with a supervisor, and they would be assigned to a particular division of court.

We had -- eventually, I think, there were

16 district court divisions, and Jefferson Parish, the judge does both civil and criminal. And I would guess probably 40 percent of the judge's time is in criminal and maybe 60 percent in civil.

But the cases would be allotted at random to the various divisions, and I had an assistant assigned to each division and a supervising assistant to supervise three or four divisions, depending on what -- and Tom was -- was assigned to whichever division, I don't know.

But I wouldn't keep him in the same division for more than about six months and I'd move him to another one, so that the DA and the judge wouldn't be too close.

So we would -- I'd move him from division to division, about six months or more, they would be assigned. And they would have a supervisor.

He eventually became a supervisor, and during that period of time, he was handling some of the bigger cases, like some of my more experienced people. Tom eventually became a supervisor, and then he decided to run for a vacancy, and he won.

Q And you supported him for that run, did you not?

A Yes, I would guess that probably, I don't

know how many, but 10, 12, 13 of the judges had previously worked at the DA's office when they became judges. And whenever those happened, and if it was one of my -- my people, I would support them if they were worthy of support.

Q And what was your impression in terms of being worthy of support? What was your impression?

A Well, they knew the law, and they had good work ethic in my office. And Tom was a good prosecutor during that time and did good work.

Q Did you continue to interact with Judge Porteous after he became a state judge?

A Not really. We met with the judges from time to time when there was something that had to be done on some kind of -- you know, some -- some judge and DA's meeting. But the judges would -- they operated on their own from wherever -- from their divisions.

I'd see them from time to time, but I didn't participate with him directly, with not much -- any more than any other judge.

Q And when he became a judge, what was the reputation he developed as a judge in terms of his capability?

A Well, my standpoint, from the criminal law

standpoint, he did a good job. We were -- we measured a good job in the fact that he kept his docket current, he would work with the DA, trying to set cases and bringing them into trial and not delaying the trials and going forward with the cases. And he was one of the ones that basically had a current docket, which is important to DAs in that time.

Q Because some judges would allow cases to lag or to go on too long?

A Yeah, they would -- they would take -- some of them would just let -- allow other defendants -- continue cases a lot more and put us in an awkward position.

Q Did Judge Porteous have a reputation for moving cases along?

A Yes, we had a good relationship in my office, DA's office. This was in -- most of the judges worked pretty good with us on that type of thing.

Q Did you hear back from assistant DAs on how they viewed Judge Porteous as a judge?

A Well, the ones that we had, the supervisors and the assistants, they had no complaint about -- you know, the judge ran a good --

he ran a good office from the standpoint of if it's a trial, his rulings were accurate and good in most instances. And it's kind of like a referee in that case, that he knew the law, he knew evidence. And his decisions and rulings were generally good.

If we didn't like a ruling, and my assistant would object and take a writ, he would ask the supervisor or the head of my appeals and research, and we didn't -- we took writs all the time. If we thought the judge's ruling was not what the law is, we'd take a writ and go to the Circuit Court of Appeals. Because that was -- it was -- just like we didn't -- I didn't generally allow my assistants to recommend sentencing. I used to tell the judges, look, you -- I don't ask you which cases I ought to prosecute and I don't want you asking my assistants for recommendations on sentencing.

So that was basically what we would do.

Q Did you have occasion to be interviewed by the FBI as part of Judge Porteous's 1994 bank -- background check?

A I don't recall it, but I'm sure I did, because all the judges, all the federal judges that got appointed in that area, some -- I'd have -- an FBI agent would come by and ask me questions about

it, find out -- they could come from different parishes or different areas.

We had one other one, who was a Judge Carr, Pat Carr, was appointed before. And yes, they would come in and talk to me, ask me questions.

Q Do you recall saying that you felt that he had a good reputation and was highly respected?

A Yeah, I probably said that. I respected him because he did a good job in my office and the district court from the standpoint of the docket and all. He did a fine job. I don't recall the specifics I talked about, but I was recommending him.

Q Mr. Mamoulides, I'm going to return you to something you touched on earlier with regard to overcrowding. You had mentioned that overcrowding was a serious problem in Louisiana. Can you describe particularly in Jefferson County what the overcrowding problems were in the '80s and '90s?

A Well, Jefferson Parish had a sheriff and we had two different police agencies that could make arrests. There were six cities with chiefs of police. There was a sheriff, a state police, two levy districts that had policemen, so any of those police could make an arrest and bring them to the

lockup, drop them off and get them booked.

So there was -- we had an old jail originally, and it was always overcrowded. And then we -- there were serious times when the overcrowding was enough where there was an old case named Holland versus Jefferson Parish, I think was the original name of that case. And it was filed in federal district court in New Orleans, alleging overcrowding and improper handling of prisoners in the jail.

And Judge Rubin was handling that case at the time. And of course me being the DA, we had to defend the parish on that. And there was really no defense. It was overcrowded.

So that case eventually moved to -- was moved from Judge Rubin's office in New Orleans to Baton Rouge and a judge by the name of Polozola took over. Eventually Jefferson Parish built a new jail, but it was also overcrowded, it filled up quickly.

So judge Polozola decided to take all of the jail overcrowding cases and he was in charge of them. And they set amounts per jail how many people could be there.

And our sheriff was put in a position of being -- he told these sheriffs, if you overcrowd for over a certain period of time, I'm going to hold

you in contempt.

So we had a serious overcrowding problem. Jefferson was a growing parish. We were about 450,000 at that time. And we had a lot of people being brought to the jail.

Q To understand how these court orders worked, is it fair to say that eventually the court order set that maximum level so that if you put in someone, someone had to be released?

A Well, it -- I think he told the sheriffs yes. But what -- they would have an opportunity to put them in a lock-up. And I think it would be within 24 or 36 hours, if he didn't have -- you know, you couldn't put him in a permanent cell, put him and have it overcrowded, you had time to try to move them out.

My sheriff took the position that if I got -- I'm not going to be held in contempt. He had a meeting with the judges and said I can't just turn somebody loose, particularly if he's sentenced to parish time or whatever. So when that happens, I'm going to let you know. And I'm either going to turn them loose, not put them in jail, or you're going to have to they will me who to turn loose.

Obviously what they wanted to do was keep

the more violent people in jail and let out some people that are maybe just serving what we call parish time, might have been put in jail for 60 days or might have been on something. So they would try to figure out that and -- I didn't participate in that because it was between the judges and the -- and the sheriff's office primarily. But there was a serious overcrowding problem.

Q And even though you didn't participate in it, wasn't this a concern for the district attorney's office, that so many people were being released because of these court orders of overcrowding?

A Well, it was a concern, but it was being handled very well, I thought, by the sheriff and the -- and the -- basically the judges, they had a committee and magistrate. What we did was Judge Polozola had put -- he brought in the DAs, even though we objected, and he wanted the district attorneys to get a jail list every day and check to see what -- who was in jail and how many -- did we get the reports.

Under law in Louisiana, you arrest somebody, technically speaking, they were supposed to file a charge with the district attorney within

48 hours. Very often we wouldn't get a charge filed, so that my screening department could look at it, we wouldn't get it for a long time in some cases.

So we started having a daily -- I assigned to a girl in my office to get a daily jail list from the sheriff's office, so we knew everybody supposedly that was in jail. Then if they were over 72 hours, and we had not gotten a report filed with the DA's office, I would send a letter to the chief judge of Jefferson Parish into whoever the arresting agency was, if it was a Westwego police or to the chief of police saying on such and such a date, Mr. Jones or whatever his name is was arrested, and these are the charges. And we have not received the report from the DA's office yet on that.

And we would call them so they could bring the reports in, because a lot of times they would be -- my screening department may not -- they may have four or five counts of stuff in there and we may just accept one, and that would have an effect on what the bond would be and everything else.

Q I'm going to return to that in terms of how these bonds were set. I just wanted to ask, in terms of a busy weekend for the parish, was it

possible in a single weekend, for example, for a couple hundred people to be released due to overcrowding?

A You mean a busy weekend because of people being arrested?

Q Yes, sir.

A I can't say for sure, but that would not be unusual for -- I mean, it could be a -- we have a big party going on or something and they could have quite a few arrests, coming from any one of those communities.

Q And Judge Polozola that you just mentioned, the sheriff that could be held under contempt, was that Sheriff Lee?

A Yeah, Sheriff Cronvich originally and then Sheriff Lee.

Q And is it correct that he was saying that he could hold not just Sheriff Lee in contempt but other --

A I think other -- I think that was probably a standing order. I don't know that, but in all the parishes that had a serious overcrowding, I think Judge Polozola was watching it pretty careful.

Q Mr. Mamoulides, people may not be familiar with, obviously, court orders for overcrowding and

mandatory releases. Can you -- is it accurate that when you're released under a court order for overcrowding, you're generally released on your own recognizance?

A Well, that depends on the judge. In Jefferson, we had anywhere from, depending on the time when it took place, we ended up with about 16 district judges.

But I can remember when there was eight, nine or 10, until they would add -- in the growth, you would get the state legislature to authorize another judge.

Those judges would set bond, and they had also a system that they worked out, I think, together on they would assign one judge over a weekend who would be the duty judge, just like I had a duty assistant all the time.

And they would have -- they also had a magistrate, I think his name was Judge Trout, and then for a while, and then Wilkie. And they happened to be justice of the peace, but they both happened to be lawyers. Sometimes you didn't have a lawyer who was a justice of the peace.

And they would -- he would be available at the court -- I mean at the jail to set bonds. And

generally speaking, they would set a bond with what they saw from the police, what the charges were.

So if you had someone charged with resisting arrest, DWI or threatening an officer, whatever it is, those would be the counts that he would be booked for. And the bonds -- the magistrate would set a bond on each one of those.

Q I'd like to return to how those bonds were set. But to close this circle, if you didn't have a bond put on you during this period of overcrowding, generally did that mean you would be released on your own recognizance?

A Yes, that could happen. But they would generally have a bond. When I said a bond set, that doesn't mean they made bond. They're being held until they either make bond -- the way the bonds are made, the bond could be $20,000, but the magistrate or a judge could say, okay, your bond is $20,000, I'm going to release you on your recognizance based on that. Or a personal bond from somebody, mom or daddy coming over to help them, or a property bond or commercial surety bond.

Any one of those would be part of the, quote, bond that it is, making up the bond.

Q If you did not have a bond, the only way

you would return to court is if you just fulfilled your promise to return to court; correct? That you were basically being released on the --

A Everybody that got arrested had bond. Somebody would set -- the judge or magistrate would say this is the bond. Whether you made bond or not. But if they released him on his own recognizance, it's technically recognizance on that amount of the bond. It's theoretically a bond but it's on nothing.

And those people, it would -- if they didn't show up, then the sheriff's office, the DA's office on an arraignment, we would -- if somebody didn't show up, my assistants would then ask the court to issue an attachment for the arrest of that person and to cancel the bond.

So based on that, then that would happen, and somebody would try to at least -- initially the sheriff's office would try to locate them and bring them in. If they couldn't locate them, they would just stay out as a fugitive.

Q And was there a problem in Jefferson Parish of people not coming back to court during this period of overcrowding?

A Oh, sure. There were lots of -- if they

made a phone call or something, basically, there was nobody looking for the numbers of people who were out on -- who may be on recognizance or just didn't show up, including ones on surety bonds, commercial bonds.

Generally, a commercial bond, judge may have a -- maybe, let's say, it's $30,000 of bond. And he would -- they would have a bondsman who would be trying to represent them to try to get a bond on that portion or some portion of it.

And so the judge or the magistrate would say, okay, we're going to -- we're going to authorize a commercial bond for $10,000, and the balance will be on your own -- on your personal recognizance or personal surety from your daddy or somebody. And that would total up the amount of the bond.

When that happened -- and if you didn't show up, I had a whole section dealing with bonds in my office. And if they didn't show up at the arraignment, then we would -- the DA would move for forfeiture of the bond and an attachment.

If it was a commercial bond, that was a forfeiture of the entire $10,000. And under the law in those days, I think commercial bonds had --

bondsmen, commercial insurance companies had like 60 days to find the person and bring them in before we could perfect the judgment. If they didn't and we perfected the judgment, then we would seize the $10,000 on that and then go forward. And still would have an attachment out for that person.

Q Mr. Mamoulides, you had stated that -- that if someone was released on their own recognizance for example, there wouldn't be anyone looking for them if they didn't show up.

A They might look the first day when they didn't come. My people would make the phone calls on the first time he didn't show up. We would have some information.

But we would ask the sheriff. And it depends on the crime. If it came out of a narcotics case or it came out of a detective bureau who had been interested in it, those guys would sometimes go look fort people.

But basically if it was traffic or some misdemeanor offense, there's just too many attachments outstanding, they didn't go look. If they happened to get stopped on the automobile -- speeding or something, and they looked in the computer that said there was an outstanding

attachment, they would bring them in back under the warrant.

But if they didn't, there would be an attachment go out, and that would be spread out all over, for all the other jurisdictions to know this person jumped bond or didn't show up and there's an attachment out for him from Jefferson Parish.

Q If someone had a bond on them, however, there would be a bondsman that would also look for them; correct?

A Well, if the bonding company -- and they had representatives, bondsmen, whoever they had, they knew if they didn't find them, they were going to lose that money that was filed.

And so the bondsmen would have people to go out and look for them. Most of them had -- in the companies would have people to go out and actually look for these people and bring them in.

Q Some of these people were often called bond jumpers, they would look for bond jumpers?

A Yeah, that was -- yeah. They would look for it because they had a reason. They were going to lose cash. And that's also -- if it was a house or somebody, if they came in with a property bond which was set by the court on stuff, we would

proceed against that residence or whatever that piece of property is. And there was some -- those people usually didn't have anybody, like bonds -- the bond people had people to go out and look.

But if they were a relative, they would call, they would call their son or somebody and try to get them come in, we're going to lose our house if you don't come in, you know. So they had somebody working on them.

Q Mr. Mamoulides, I would like to show you in Exhibit 1134, and I'll represent to you this exhibit is an article showing the different rates at which criminal defendants failed to appear at court. That is, whether they're released on their own recognizance or if they're released on bond.

And I'll represent further that this report suggests that there's a much higher rate of people coming back if they're on a bond.

And the line I want to draw your attention to and ask you about is actually on page 26. I'm going to read the line to you to see if this is also your experience.

The study found that "defendants released on surety bonds are 28 percent less likely to fail to appear than similar defendants released on their

own recognizance."

Is that also your experience, that there was -- that having a bond meant that they were more likely to appear, to put it in a positive sense?

A Absolutely. Because the bonding company, or the insurance company, they knew they were going to have their bond forfeited and they had to go try to find them. Those people, they just took off if they could.

MR. TURLEY: Madam Chair, we would like to move Porteous Exhibit 1134 into the record.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

MR. TURLEY: Thank you.

(Exhibit Porteous 1134 received.)

BY MR. TURLEY:

Q Now, to return to Jefferson Parish, during that period, did the court system start to use what are called split bonds?

A Well, I don't know where that term comes from, but what it really was is, in effect, would be let's say the bond is $30,000 and the judge is going to set whether it's going to be a property bond or if the guy came in and said I have a piece of property worth $10,000, Judge, or whatever, or he

said the bondsman, they said this man or this family is willing to put up 10 percent of a $10,000, that's usually what the fee was for the bond. So that's $1000.

So the court would then say all right, if that's all he can make or whatever he could make, they would put down a $10,000 commercial bond, $10,000 property bond or $10,000 personal bond on some -- on the daddy and the balance in recognizance.

So in effect, you're splitting the amount. And that's what that amounts to.

But most of the judges would not be upset with that because they had some portion of it in the form of a surety, of a commercial surety, meant that they were going to have a better opportunity to come to court, because they knew they would forfeit that bond.

Q You referred to most judges. Is it true that most judges did execute split bonds?

A If -- yeah, if that's what you want to call it. I mean, they would -- my office didn't participate in the setting of bonds and all. We didn't -- and we weren't there at the jails or anything like that, whatever, when the bonds got

set.

There would be somebody, the magistrate or whatever or the defendant, would hire a lawyer and he would go -- if he was in jail on a bond of whatever amount was there, he may go talk to the judge and say, look, they can't make this, your Honor, can we do -- they would talk to them outside our presence.

Now, remember, the DA has not gotten the charge, we don't have a record on them or anything on that.

The only time we would participate is if we had a call from, let's say, the narcotics squad or from the detective bureau saying they have got somebody in, and he's a flight risk, he's got a bad reputation, a bad record, and we'd like to -- we're going to ask the court to set a high bond, would you have an assistant available at the hearing.

We always, if there was going to be a reduction of bond, they had to do a motion in service. And my people would go in at that time.

And the only other time is if it was a violent criminal and the police didn't want him out. We would then recommend a -- that he doesn't get reduced in the hearing.

Normally, otherwise, we left it up to the court. We would not participate in trying to just hold them in, because we had a jail problem. And a lot of the judges wanted to make sure the guy shows back up.

But if he was a flight risk, had a bad reputation, came in -- like I can remember one, it was a boyfriend of some girl who had a baby, and he had burned the kid with cigarettes. And they had a big deal on that.

And we were told about it. And they went in, and we asked him not to release because he would take off. And he had a bad reputation and we kept it in. That particular case, it went all the way to -- the defense lawyer was able to get the federal judge to order -- hire a -- our local judge to refuse the bond. Our local judge refused. So we had a big fight between us and the federal court. Ultimately the federal judge recounted and they left the bond as it was.

Q Now, in those cases, those cases you described where you would be involved --

A Oh, yes.

Q -- generally, did judges go with the recommendation of the district attorney in those

cases?

A Yeah, they -- it depended. We would not make -- I just told you, we wouldn't make a recommendation that the bond not be decreased, or would leave that up to the court if it was just a routine case. If we didn't have some knowledge of the request of the police or something, my assistant would say, well, this is -- this is why, your Honor, and we'd give them the reasons.

And basically, I think the judges would agree or take a hard look at it before they would release somebody, particularly if it looked like he would take -- skip the country, you know, take off, if he was a risk.

Q Mr. Mamoulides, do you recall any case where Judge Porteous set or adjusted a bond over the objections of the district attorney?

A No, I would not have -- I mean, I wouldn't have been in that particular courtroom. But I don't recall one either way, on any of the of the judges. But if it was a routine thing, they would ask. If the judge didn't do it, we would proceed, that's all. That was the discretion of the court.

Q We've been referring to this as split bonds, both the House and the defense. Do you --

did you see anything wrong with split bonds?

A Oh, absolutely not. The type of bond that is set by the court, the judge could say, no, I want a property bond, no, I want it all in the commercial, I want it -- let them off on recog, whatever. That's the call of the judge and the magistrate, not the call of the DA. Didn't bother me at all.

As a matter of fact, just because of what you showed, if it was -- we were always more pleased if there was some sort of commercial bond involved, but somebody would be looking for them if they didn't show up.

Q Now, you had mentioned when people are arrested, eventually a bond is set. Was it sometimes the case that a bond was set higher or too high because of charges later being dropped for a defendant?

A Well, remember, the judge, if he -- say it's on a weekend, some night, and the judge is on call, and they call him up and say we've got this guy in jail, he's charged with $100,000 bond for armed robbery or something of that.

If the offense was a serious offense, the judge would say fine, I'm going to put $100,000 bond

on him until we can get a look at it tomorrow or morning and have a look, if he wants a reduction, he'll have to file something on it. So it happened.

Not only that, you could have four or five counts of somebody. They charged somebody with a burglary or several different things. And when the police would put the counts on, the bond -- the magistrate would put a bond on each one of those counts.

When it got to my office, in the screening, looked at it, they looked at the thing and they said, you know, we're not going to accept that, we'll only accept these two. You got him on resisting arrest, DWI, threatening an officer, whatever it is. Some of those things we wouldn't charge. And therefore, the amount that would have been set on that count would not be -- they would not have to make a bond on because we weren't prosecuting on that count.

But sometimes we didn't get that case brought in for maybe weeks. We wouldn't know when the police would call them to try to get them there. But more serious cases they were pretty good about getting the charges in as quickly as possible.

Q I'd like to ask you a little bit more

about the mechanics of the system.

Is it accurate to say that Jefferson Parish often had a magistrate judge that was assigned for a week by rotation?

A I don't know how long they assigned them, but that was done -- the judges did that among themselves. In other words, they would put one of the judges on duty to receive calls, to sign warrants, to sign whatever there is. He was available to the -- to the sheriff's office or any of the police agencies to go in. Suppose they wanted to get a warrant for arrest, they would bring it to the judge, or search warrants. That judge would be the on-call judge for the criminal section.

And the magistrate would be primarily -- the other magistrate I was talking about, the ones that I told you used to be justice of the peace, they were there just to set bonds. And if -- they usually set the bond based on what the charge was. Coming in, they had a burglary, this and that, they would just play a ballpark, and just say I'm going to put this on it. That would hold them until something happened.

Q Now, looking at those magistrate judges that did this, was it true that some of the judges

were better than others in performing that duty?

A I don't know that. I hear that, some of the judges would not be available to the detectives would have to go find another judge. Because they knew all the judges, and they could call them at their home. Any district judge could sign a warrant or search warrant.

If they couldn't find the judge who is the duty judge, who is supposed to have a phone and do that, then they would go find a judge to try to convince him to sign the warrant so they could get this guy before he took off, or whatever it is they were working on.

Q So your detectives would call on judges who weren't magistrates and say look, we really need to have this done, we can't reach the magistrate judge?

A And the detectives knew which judges were more able to accommodate them. Yeah, go see judge such and such, he's here, across the river, this one is over here.

They knew the judges and they would call and say Judge, I can't find the assigned judge, would you let us come talk to you about a warrant, a search warrant or whatever it's going to be.

And those judges would either accommodate them or they would pick up the phone and try to find the duty judge and read them the riot act. But that was among the judges, had nothing to do with us.

Q And would you -- sometimes detectives, were some judges simply more available so they would go to -- try the same judges?

A Sure, that's normal.

Q Do you know sometimes would they call Judge Porteous for that service?

A I'm sure. I don't know. I wouldn't be involved in that. I mean, I don't know what his relationship was with all the detectives and all. But I would assume that he was available to -- he was a good prosecutor, and he understood.

Q Now, I just want to be certain about one thing. Putting aside the term "split bonds," which we have been using, was it your understanding that Judge Porteous invented split bonds, or did many judges do split bonds?

A I don't know what the term -- when the term "split bonds" -- that's not anything unusual. I mean, somebody would get arrested for a charge, and he's -- he's in jail. So he calls mama or daddy. And so they come over there to try to see

what the thing is and see what it's going to take to get them out. And the police would say here's what the bond is that's been set.

So then they would either have to put up something or they would find -- there would be a bondsman around, lurking around, to try to get the business.

So they would talk to them apparently and say well, $25,000, it's going to cost you $2500 and whatever it is. And that's how that happened.

And then if you -- if you could only make that amount, they would say I don't have more than 2500, and the bond is $100,000, that means you can't get out of jail unless -- either the bondsman talking to the magistrate or defense attorney, they get a lawyer at that point to call a judge and say, you know, the family --

In most instances, if there was a possibility of a commercial bond, the judges preferred it, because -- at least a portion of it. That's what you would call a split. They would take a total bond and say okay, we're going to allow this much on here, this many on property, this much on recognizance or personal surety of the daddy, something like that.

Q Let me ask you, another aspect of that bond system. Is it accurate to say that during this period we're talking about, roughly in the '80s and '90s, that the Marcottes cornered -- had a corner on the business for bonds?

A Well, that's what it appears now. I didn't know it at the time, whatever it was. But they were very aggressive and did a lot of bond work. That's what they -- how they made their money.

Q Was it your -- is it your understanding that the Marcottes had roughly 90 percent of the bond business in Gretna?

A I can't answer that. I can tell you this. Later on, way at the time when I was gone, Marcotte was indicted. And I think a couple of deputies that were in Harry's office were fired and indicted for making -- giving preference when people came into jail, notifying them who they were and when they could come over there and look for them.

I guess the first bondsman there would have a hand up on trying to get the bond put together.

Q Let me ask you about that. You brought up the indictment with the Marcottes.

You're familiar with the federal investigation called Wrinkled Robe?

A Yeah, that happened after I was gone, but yes.

Q I want to clarify that. You were never -- in fact, you've never been charged with any ethics violation?

A Not that I'm -- no, no.

Q And you've never been charged with any obviously criminal investigation?

A I was very disappointed with what happened in that. But if they did what they did, they deserved it.

Q Now, to your knowledge, in the Wrinkled Robe investigation, was Judge Porteous ever an unindicted co-conspirator in that case?

A I don't think so. I wouldn't have known. It would have came out of the U.S. Attorney's Office. And that's where they did it. And we've had -- there were two of those judges had been assistant DAs. One of them was Bodenheimer, he had been assistant DA, and was a good assistant doing that, when he was a prosecutor, and a fellow named Green.

And they had Judge Green on camera, taped,

taking money, cash money from either a bondsman or a bondsman's representative, I don't know who it was. But -- and they both were convicted.

Q I'd like to return to them in a second. But was it your understanding of the Wrinkled Robe investigation, they investigated all the judges in this judicial district?

A Well, I'm sure once they had that --

MR. SCHIFF: Madam Chair? Madam Chair, I'm going to object. This witness said the Wrinkled Robe investigation happened long after he had left the DA's office. He's being asked about his knowledge about something that didn't take place while he was the DA.

MR. TURLEY: I'll withdraw the question. It's not important. Thank you, Madam Chair.

BY MR. TURLEY:

Q Now, the House has relied on a statement made by Judge Bodenheimer, where he makes some comment about from -- where he relayed a comment from Judge Porteous about never having to buy lunch as a judge.

Have you heard that comment?

A I mean, I wasn't there, but I've heard the comment on testimony here. I mean, I heard it on

C-SPAN.

Q Well, let me ask you this. You were not there. But Judge Bodenheimer testified last week that he was actually relaying a joke made by Judge Porteous in front of other people.

Is that consistent with your past relationship with the judge, that he was given to those types of jokes?

A I'm -- I'm sure he could be, it could have been. But yes, I mean, that's the -- I mean, that's -- the judges and the lawyers in Jefferson Parish very often had -- would go to dinner and go to lunches and what have you.

And as long as they maintained their -- their own ethics problems with it -- we had a very active judicial ethics in the state. And you didn't very often have lawyers and judges going out and -- to my knowledge, and talk about a case. But you don't know that. Depends on the individuals.

And the defense -- on the criminal side, the DAs and the public defenders, we were able to work all time, they would work together and talk and talk to the judges. But not -- we wouldn't go to lunch with them.

But there was always a close relationship

with the DAs and the -- and the indigent people. I had an open policy. We would allow the defense attorneys to see our entire file, as long as we had to sign -- the point is if they didn't have a good defense attorney, not good for the prosecution. Because the case would be overturned after conviction and the lawyer would be called incompetent. So therefore I would have to try the case again.

So I helped get the funding for the indigent defense office in Jefferson Parish, because I wanted them to have competent lawyers, because it caused me more problems.

Q Well, let me turn to that, the relationship between lawyers that you just discussed. Can you give me an idea of Gretna itself? I mean, is it accurate to say that Gretna is a relatively small legal community where lawyers and judges knew each other?

A Well, Gretna is a -- is the -- everywhere else you'd call it the county seat. It's a parish in Jefferson. That's where the courthouse was. It's across the river from New Orleans, it's a smaller town. It's been there a long time.

They had two or three -- you know, in the

area, restaurants and that. And so the lawyers who operated in Jefferson came from all over. They came from the east bank, from Kenner and Harahan and New Orleans. But they also knew each other.

And they would go over, and rather than go back across the river, if it was lunchtime, they would go, they would go to some of the little restaurants around in Jefferson -- in Gretna.

So yes, it was a small, so to speak, community. Most of those guys and the judges and the lawyers, prosecutors, they grew up together, they went to high school and college together. I mean, they knew them.

Q So you mentioned lunches. Was it fairly common for -- is it correct that judges and lawyers would go out to lunch together?

A It wasn't unusual.

Q And was it also common for lawyers to pay for lunches for judges?

A I would assume so. I mean, yes, they would do it -- that was not unusual.

Q And are you aware of any rule in the 1990s that said that a judge could not accept a lunch from a lawyer?

A I don't think there were any state ethics

laws on that. They were depending on the judge's own integrity, if he was going to do it or not. I can't imagine a judge going to a lunch with somebody he didn't like or somebody he had a quarrel with or something, or if he felt the guy was trying to just take him to lunch to do something. I mean, most of the judges that I knew on that, they wouldn't -- they wouldn't allow that to take place. Their own ethics would stop that.

Q So is that -- so is it accurate to say that you were never really concerned about any judge being swayed by lunches?

A Particularly not in criminal cases. I mean, I didn't fool with the civil -- but I mean, the judge, we tried the cases. If the jury found them guilty, they're -- and we wouldn't participate in the sentencing. If it was a nonjury trial. That was strictly up to the court. We would not -- I would not object to a sentence and I would not comment on the sentence the judge made, even though I may not dis -- I may disagree with it.

But unless it was an illegal sentence, and we would immediately call it to his attention, tell him you can't do that. If he did it anyway, we would take a writ.

Q Mr. Mamoulides, was it also a common practice particularly among holidays for lawyers and others to give gifts to judges?

A I think that's probably true. I think the civil bench, all over -- Christmas and all, they would bring -- they would send things to the judges. I assume. I wouldn't -- I didn't -- I didn't do it. But I would think they would give them gifts, something not out of -- not big or something like that.

Q Would it concern you as a prosecutor to know that gifts were given to a particular judge by lawyers or others?

A No, I would not know about it, and it wouldn't -- just, you know, gave them a car or something, yeah, that would concern me. But, you know, sending them a bottle of whiskey or bringing them a cake or something, I wouldn't know about it, but it wouldn't bother me.

Q I'd like to ask you a little bit about expungements. We've talked a lot about expungements in this case.

The expungements are specifically allowed under Louisiana law, are they not?

A Yes.

Q Okay.

A It depends on what's done. They have an article -- in our office, we would authorize or agree, almost like a plea bargain, if we wanted to allow someone to lead to an 893, that meant that he was going to get some probation or whatever, parole. And at the end, if he successfully did it, if the judge gave it to him, then they could come back in at the end and file the motion to expunge the record.

Q And those types of 893 sentencings were fairly common?

A Yeah, particularly for young people and kids or people that didn't have records. Even if the record, if they were fine, it was up to the discretion of the court. The court had a lot of discretion, the judges.

Q The purpose of expungements for judges was to give someone a second chance. Is that how it worked?

A It was the purpose for the whole law.

Q Would it be a typical case, for example, we have an expungement case involving an individual who committed a crime at the age 17, 17 years previously. Is that the type of typical case where

you would seek an expungement to clear the record?

A Yeah, if it was something way back like that, it probably was done before you had an 893. But it was not unusual for the court to entertain a motion. In fact, there was some statutes, I can't remember them now, it's been a long time, but like on DWIs and what have you, they would automatically go off the man -- the person's record after like 10 years, so they couldn't always be there. The state did that on it.

So yes, it's not unusual for the court to do that, but it had to be with the court's approval.

Q And is it generally true that your office didn't object to expungements in most cases?

A We didn't -- that depended on the assistant and what the background of the guy was. If the assistant in the courtroom decided he didn't -- he would oppose, I would say I object. And if he's serious about his objection, he would tell his supervisor or the -- my appeal man. And we would file a formal writ on it, if we thought it was -- but very seldom would do that. Most of the time if the judge wanted to do it, he had to live with it more than anybody else, he's the one that did it.

Q Now, in this case we've talked about two expungements. I want to talk about the first one involving a man named Reverend Aubrey Wallace. I'll represent to you that Judge Porteous had a hearing to consider a motion filed on Mr. Wallace's behalf, seeking what's called a set-aside of a prior conviction under 893.

A Right.

Q Okay. At the hearing, the assistant -- I'll represent to you that the assistant district attorney was an individual named Mike Reynolds. Are you familiar with Mr. Reynolds?

A Yes, he was one of the assistants, he had worked in New Orleans as an assist and came to work with me for a couple years. Did a good job.

Q Mr. Reynolds does not object in the hearing, but I wanted to ask whether it is at that hearing that usually any objection would be heard to a set-aside?

A If he was in a hearing, that's when he could voice his objection into the record.

Q Did Mr. Reynolds ever come to you to raise any concerns about that expungement -- I mean that set-aside, I should say?

A Personally, no, I don't recall any of

that. He would have normally gone to his supervisor or to the -- to the appeals person who would then have that. And I didn't -- expungements would not normally come to me. I wouldn't be -- know about them. 16 courtrooms that were going on, and it could be any of those.

Q Are you aware of Mr. Reynolds coming to his supervisor to make objections either about the set-aside or the expungement?

A No.

Q Now, if Mr. Reynolds had come to you or the supervisor with concerns about a set-aside or expungement, would he have been punished in any way for doing that?

A Absolutely not. If he had a reason, he would give his reason. His adviser would come in and tell me. It may be that it was improperly done, that he wasn't following the law, in which case we would say no, you can't do this, it's too late or it's been too long or whatever it is. And we would use the portion that the law says, and say but Judge, you made a mistake.

It's like a judgment sometimes would give a sentence that was improper, like some sentence that could come out on an armed robbery did where he

didn't do certain things, it understand mandatory. If we caught that, we would go back and say Judge, we would -- because it doesn't follow the law.

But nobody would get punished for that. He would give his opinion why he was doing it.

Q Now, Mr. Mamoulides, we also had an expungement for an individual named Jeff Duhon. And I want to just ask you, in that case, there was -- we showed evidence of one judge signing an order in a case from a different division. Was there anything wrong with a judge in a case like that of signing an order from a different division?

A No. All of the district judges were technically the same in authority. And the rules that they would make among themselves was between them.

For one judge to change something, what another judge did, you'd have to assume, or we would assume, that he would have talked to that judge. If he didn't, that judge and he would have to have a battle about it.

But it was legal to do that, and the judge may -- something coming up and he may not be there. Any judge could theoretically do that. And it didn't happen often.

In the old days when I first was there, all the judges -- a lot of the judges wouldn't take criminal cases. So among themselves, they would say, only three judges are going to take criminal and we're going to be -- those are the ones that are going to do it.

That got to the point where we couldn't get anything done. So when I was DA, I came to the judges and got a big meeting saying I want -- I'd like to have all the cases set by -- by -- allotted across the board, felonies, relative felonies, capital cases, each allotted separately, so one judge wouldn't get all the capital cases, which took so much time.

So we put balls in a thing and we had different one. There were still things happening, judges would get -- so I would send an assistant every day to witness the drawing of the balls out of those things to make sure they were even and the judges couldn't play games.

If they wanted to change among themselves, they could do that, but one judge didn't get all of the death cases or whatever it is, and then fall way behind on his regular docket.

But there was absolutely -- a judge doing

something for another judge is legal, and it's legal on the record. They have to make that change themselves. It wasn't up to us. We couldn't do anything.

We would be bound by whatever had happened with the judge making that. But that judge and the judges' rules among themselves, saying don't you sign one for me or yeah, would you take care of this, I don't know what went on from that stuff.

But it would be a legal thing, and we would assume that that was how it went.

Q It would be helpful to get some understanding of how these cases developed. You had talked about expungements. But am I correct there's first a motion to set aside before any expungement occurs; correct?

A Well, no, it depends on how -- the expungement in itself is let's say we've got a guy on a charge that is -- that could be an expungeable charge, in other words, he pleads under the expungement, he pleads guilty under this particular article, which in itself says that if he -- the judge sentences him, gives him probation, and if when he completes that probation, you would automatically be able to come and his lawyer to be

able to file a motion to expunge because he has successfully done what he was told to do, okay.

That would be filed and we would not object to that and it would get done.

And a lot of times the DA's office, we didn't want that to happen, we'd say no, we're going to object to a plea on 893 -- we didn't charge people under 893. We'd charge them for a crime.

Q Right.

A If we didn't agree to if, then we'd say no. Now, the judge had great discretion, fine, I'm going to do it anyway. The judge had discretion to give them a charge -- I mean a sentence that could be expunged. But generally speaking, that would be done with the DA and the assistant and not me but the assistant DA and the defense lawyers, saying, well, would you all accept if he pleads guilty to an expungement. And I said -- well, they would look at it and see it. If he didn't fall into a category which allowed them to do it, we would say no, and then it was up to the court.

Q Now, you refer to expungements as this would be automatic. Expungements at that point were automatic or ministerial?

A No, they're not automatic. Someone has to

file -- if they didn't come back and file for that expungement to seal that record and show it, then it didn't happen. Finish his probation and all, it just stayed open as a guilty plea and whatever it is, even though it was under 893.

Some action, as I recall, had to be taken by the defendant or his attorney when everything was completed to come in and do it. And that expunged the record. And that meant that the record couldn't be picked up.

Q Now, in this case, in the Duhon matter, we earlier looked at an order signed by Judge Richards, setting aside a sentence in that -- in that case.

When have a set-aside motion like that, isn't that the key motion --

A On that type of thing, yes, it would have been the key motion that would do it.

Q As opposed to the expungement, that's the one --

A Well, it's a set-aside on the -- there's some rules in law, and, you know, if you -- if it happened after they tried to change a sentence after the sentence was being executed, there were some statutes that didn't allow the court to do that, they couldn't go back and change it once it was

being executed, okay.

MR. TURLEY: That's all my questions for now, Mr. Mamoulides. Thank you very much.

I can pass the witness.

CHAIRMAN MC CASKILL: Thank you, Mr. Turley.

Cross-examination?

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Mamoulides, when you first became the district attorney, did the assistant district attorneys have some power to set bonds in certain cases?

A Yes, when I became an assistant in 19, I think it was, '66, I was shocked one day when I get a call at home from a man who was a bondsman by the name of Rock Hebert, who I didn't really know, saying he had such and such in jail and wanted me to set a bond.

And I said do what? I had never done any criminal law per se. But -- and I said no, I'm not doing that.

And the next day I met with the DA, and talked about it, and he said yeah, he said the law allows the DAs to set bond. And I said, well, I

don't want to do that and I don't think we ought to be doing it and so forth. At the time we talked.

And I found out then that every public official in the Parish of Orleans had bond-setting authority, even -- so as it went -- as things went on further and I did -- became very active with the DA association, I got Frank Langridge to agree to allow me to go to Baton Rouge and revoke that. We did away with that. No DA had the ability to set bonds. And Frank told all of the assistants, don't set bond. We didn't set bonds.

Q Back at the time before the change was made, back in the time when assistant DAs could set bonds, did you become aware of a practice of, I think, the bail bonds, Mr. Hebert, that you mentioned giving gifts to assistant DAs?

A The same year, I was appointed in October I think, and in that same year I got a gift certificate sent to my house from Hebert Bonding for like $80 worth of something. I brought it to Frank and said who is this? Frank Langridge, my boss. And they told me. And I said I don't want it, I'm not taking that, and gave it back.

When I did become DA, I wouldn't allow my assistants to take anything from bondsmen or

anybody.

Q Why is it that you didn't want your assistant DAs to take gifts from bondsmen?

A Well, I didn't want -- nothing wrong with it per se, but there was a -- it was obvious that the -- at that time when they would set bonds, that's why it was there. They would -- they would be easy to call an assistant DA at home and get a bond set than go look for a judge.

So all that ended at that point. And Rock Hebert, who had been around for a long time, Hebert Bonding, he knew all the judges, would put on Christmas parties and do all kind of stuff. We didn't allow that.

Q So it's fair to say, Mr. Mamoulides, that you put an end to this practice of bondsmen giving gifts to the DAs because you didn't want the DAs beholden to the bail bondsmen; correct?

A Correct.

Q You thought there was something potentially corrupting in the bondsmen giving gifts to people who could set the bail, am I right?

A Yes, sir.

Q Please let me finish. Am I right about that?

A That's right.

Q If you didn't think it was appropriate for deputy DAs to take gifts from a bondsman, how would you feel about a judge taking gifts from a bondsman?

A Well, I didn't -- I didn't know about any specifically. On Christmas, like you said, people giving Christmas presents, that's up to the judge, if he want to accept it or whatever, that's fine.

It wasn't illegal to do that. And --

Q So Mr. Mamoulides, your testimony is you wouldn't want a deputy DA who can set a bond to take a gift?

A Absolutely not.

Q But you're okay with a judge setting a bond who take a gift?

A I didn't say it was okay. I may have left it up to him and his ethics. But the assistant DAs, I didn't want them taking presents from bondsmen.

Q So it would concern you if a deputy DA did it, but not if a judge did it?

A The judges didn't work for me. I'm responsible for the assistant DAs. That was who worked for me. And I don't know -- and I wouldn't have known, except when I got that one and I told the assistants after I became DA, nobody -- you

cannot accept a gift.

Q As DA, did you accept gifts from bondsmen?

A No.

Q As DA, did you accept expensive lunches from bondsmen?

A Never went to lunch with bondsmen.

Q As DA, did you allow bondsmen to do car repairs for you?

A No.

Q Would you allow bondsmen to do home repairs for you?

A No.

Q What would you think about a judge who let a bondsman do home repairs for him?

A If he was an old friend or something, that's up to him. Judicial ethics are different. That's what he has to live with, not me. And I wouldn't have known about it anyway.

Q Your view would be laissez-faire, let a bondsman do whatever he wants for a judge?

A Well, it wasn't a crime. If it was a crime, I would do something to investigate or something like that. But he could have been his brother. Who knows who the bondsman is. I don't -- I didn't have any knowledge until I was reading some

of this stuff on that. But I didn't know specifically of any instances until --

Q And as DA, it wouldn't concern you that a judge who is setting bond on defendants that you're charging is getting home repairs and car repairs and gifts from a bondsman? That wouldn't concern you?

A I don't think -- setting bond -- and again, that's again -- we stayed away. We wouldn't recommend bond and being set. And it was always done without a DA there. That could be in the middle of the night or whatever it is. Now --

Q But my question, Mr. Mamoulides, is wouldn't it concern you that a judge who was setting bonds in cases you were prosecuting, defendants you want to show up in court, is getting car repairs, home repairs, gifts and expensive lunches to trips to Vegas from the bail bondsman? Wouldn't that concern you?

A Well, it doesn't concern me if the bond got set. As far as I'm concerned, the bond was set and it's a commercial bond or what have you. It's only if they don't show up in court that I would get concerned with it. That's -- we would automatically forfeit the bond and ask for an attachment.

But the practice of setting -- everybody

is entitled to bond. Whatever they set it at, it's at the discretion of the court and based on the background and what happened.

But that doesn't mean that just because it had -- he set the bond that there's something wrong with it.

Q And so if the judge -- let's say the judge was getting cash from the bondsman --

A That would be.

Q As long as the bonds get set, you don't care?

A If I knew about it, I would think it was wrong, cash to pay a judge to do something.

Q But you think it's fine to take all of the gifts in lieu of cash that -- car repairs --

A I would not have known that. When you're saying that -- it wasn't up to me to go by and ask a judge on a Monday morning and say did you get money for this.

Q Mr. Mamoulides, I'm asking if you knew --

A As far as I'm concerned, if I were judge, I would not --

Q Mr. Mamoulides, would you have concern as the deputy DA that the judge who is setting bond and determining in part whether your defendants show up

in court so you can prosecute them, is getting all kinds of favors, trips to Vegas, car repairs, home repairs, free lunches? Would it concern you if you knew that?

A Well, I would think it would be improper at that point from the ethics standpoint. But I wouldn't have known it.

Q So you'd concede that would be improper ethically?

A Well, it's improper, when I don't want my assistants having at that time -- to be able to have a bondsman come and call them on the phone and go get something done for them, okay. I wouldn't -- that was a portion of the district attorneys -- bonds got set by the judge. We did not -- we didn't recommend bonds unless we were specifically asked by the sheriff's office or somebody on a flight problem or whatever. It was done without us being there before we even got a charge. And I didn't want my people participating in that.

Q Mr. Mamoulides, you were asked a lot of questions about the prison overcrowding situation.

A I'm sorry, the what?

Q You were asked a lot of questions about the prison overcrowding situation.

A Okay.

Q Let me ask you a different question. How would you feel about a judge setting bonds not with an eye to the prison overcrowding but for the purpose of maximizing the profits of a bail bondsman who is doing him favors? How would you feel about that?

A Well, I don't know if that -- you ask me a hypothetical question whether he knows that's maximizing it or not.

If he is -- if a bond is being --

Q Mr. Mamoulides, you've testified to the character and reputation of --

MR. TURLEY: Objection; counsel is not allowing the witness to finish his answer. I object that he should allow the answer to be put on the record.

CHAIRMAN MC CASKILL: Overruled.

BY MR. SCHIFF:

Q Mr. Mamoulides, you've testified to the character reputation of Mr. Porteous, and I would like to ask you how this would affect your opinion of his character and reputation. How would you feel about a judge setting bonds not with an eye towards prison overcrowding but with an eye towards

maximizing the profits of a bail bondsman who is doing him favors? What would you think about the character of a judge who would do that?

A I -- you're asking me at a time -- I mean, I don't -- it's hard to answer the question. I don't think it's proper, of course. But when the jail was overcrowded and the bond had to be set, the bond was generally set by a magistrate before, or whatever it is.

The type of bond that would be set, there could either be a commercial or they would add a commercial to a recognizance to a personal -- personal bond or property bond.

Q Mr. Mamoulides, you recognize that would be improper; right?

A That would be improper?

Q It would be improper for the judge to be set the bond --

A But I wouldn't know what his reason would be.

Q Mr. Mamoulides, I understand, I'm not asking you whether you knew he was doing this at the time.

My question is, would it affect your opinion of his character if you knew that he was

setting bonds to maximize the profits of a bondsman that was paying for his trips and his car repairs and his home repairs? Would that have --

A If that were true --

Q Would that affect --

A If that were true, I would not like it. But I can't imagine the judge setting a bond to maximize anything for somebody else. There's a bond that gets set on a commercial surety is if they can make that bond, he would rather have a commercial surety because there's a better chance of that person coming back to court. And so his reason for doing it, I don't know that.

Q Mr. Mamoulides, if the bondsman were to tell a judge, this is the point where I want you to set the bond, because this is the maximum amount I can wring out of the family, you can set a bond for a lower amount, and he'll show up. But if you set it at this amount, my profits will be maximized. Would you do that for me, Judge? How would you feel about a judge who did that?

A If he did that, I think it would be improper. But I think if the bondsman -- I can't imagine a judge letting a bondsman telling him what to set. He would make it his decision on what he

thought the people could -- what the amount of that surety bond would be.

Q You would agree that would be unethical, wouldn't you?

A Well, if it was accurate and correct, yeah, I think it would be unethical if it were true.

Q Were you aware at the time, Mr. Mamoulides, that, in fact, Louis Marcotte was paying for innumerable expensive lunches for the judge?

A No.

Q Were you -- did you know at the time, Mr. Mamoulides, that the Marcottes were paying for trips for the judge to Vegas?

A No. I just read that recently. I had been gone since '96.

Q Did you know that the Marcottes were having the two people Mr. Turley asked you about, employees of the bail bonds businesses, Mr. Wallace and Mr. Duhon, did you know that he was having them do car repairs for the judge?

A No.

Q Did you know that he was having them do home repairs for the judge?

A No. I wasn't there.

Q If the judge had asked you whether you had any objection to his setting aside a conviction of one of Louis Marcotte's employees who had been doing him favors, doing his car repairs and home repairs, what would you think of that request?

A I would tell him it was wrong.

Q And I take it he never asked you whether you approved of his setting aside Mr. Duhon or Mr. Wallace's conviction, did he?

A No, I don't recall anybody asking me about those.

Q And had he asked you and told you what they were doing for him, you would have said no, that's wrong?

A I'd tell him don't do it, for that reason. If that's the reason he would give me. And if that's the reason the bondsman has been told --

Q Mr. Mamoulides, I think you said with respect to -- we were on the subject, Mr. Turley was on the subject of Mr. Duhon, that this was a case where another judge was assigned the case, another judge had passed the sentence, another judge had done a post-sentence change, but Judge Porteous pulled the file and did the expungement himself. That would be unusual, wouldn't it?

MR. TURLEY: Objection to the question. There's no evidence that he pulled the file. The question assumes a fact not in evidence.

THE WITNESS: If that would have happened --

CHAIRMAN MC CASKILL: Excuse me. I'm going to sustain the objection. Reword the question, if you would, please.

BY MR. SCHIFF:

Q It would be unusual, wouldn't it, for a judge in which another judge has handled both the original sentence and a modification of sentence, it would be unusual for another judge to take the folder from the other -- the first judge's department and handle the expungement. That would be unusual, wouldn't it?

MR. TURLEY: Same objection, Madam Chair. That fact is not in evidence.

CHAIRMAN MC CASKILL: If you could just omit the part of pulling the file.

MR. SCHIFF: Thank you, Madam Chair.

BY MR. SCHIFF:

Q It would be unusual for a judge to intervene in a sentencing matter that was currently being handled by another judge, wouldn't it?

A I would guess it would be unusual. But it's not all the way un -- we had judges that would -- would be absent or be in the hospital, what have you, and they would -- another judge would handle their business. Or if the judge talked to somebody, maybe one judge couldn't get there.

I would have assumed -- first of all, it was legal. I would have assumed that the judges talked to each other. Who am I to say that they didn't, that he was -- look, I'm going to do this because it's legal for him to do it. If a judge can't be there or is not there.

But normally speaking, they would talk to them and would not come to us.

Q Mr. Mamoulides, you're making a lot of assumptions that maybe a judge is in the hospital. You have no indication --

A I have no idea.

Q May I finish, please? You have no indication that the judge we're referring to here, Judge Richards, was in the hospital at the time Judge Porteous expunged Mr. Duhon's conviction?

A No.

Q You have no indication of that, do you?

A No.

Q If you could answer verbally for the record. You have no indication that --

A No. I don't know -- he could have been sitting in his office and said look, I want to do this, and say okay. That's up to them.

Q And you also have no knowledge of whether they ever discussed the case, do you?

A No way. I would not know anything about that.

Q In fact, this isn't a situation you mentioned like on your -- during your direct testimony, where the original judge didn't get involved in criminal matters, because clearly --

CHAIRMAN MC CASKILL: I am reluctant that I have to do this, but I do, and disappointed that I have to do it. But we do not have seven members on the dais right now. So we are going to have to stand in adjournment. And I implore the members who are here not to leave. We are trying to find Senators and locate them and get them here as quickly as possible. We do believe that one other Senator will be here any minute, which will allow us to immediately continue. But for the moment, we're going to have to stand in adjournment, and hopefully it will be no more than three or four minutes before

we can come back.

So you all know, Judge Porteous, you have six hours and 30 minutes left, and the House impeachment team has six hours and 35 minutes left. And for the members that are here, when this witness concludes, we have six witnesses left.

So if we can get everyone's attention again and get them back in the habit of showing up here, not leaving here, I'm optimistic that we can finish the evidence today. And I apologize to the lawyers and to the other witnesses for this recess.

(Recess.)

CHAIRMAN MC CASKILL: You may resume your cross-examination. Thank you for your indulgence.

MR. SCHIFF: Thank you, Madam Chair.

BY MR. SCHIFF:

Q Mr. Mamoulides, it's unusual to have to interrupt a cross-examination. I don't usually have to ask this question, but during the break of the cross-examination, did you have an opportunity to consult with attorneys for Judge Porteous? I'm not asking what your conversation was, but did you have an opportunity to consult with him?

A The statement, he came up and spoke with me for a minute just to tell me they were going to

have a few questions on redirect.

Q Mr. Mamoulides, in order to have a sentence set aside, isn't it correct under Louisiana law that a person has to originally have been sentenced under 893?

A I'm sorry. I didn't catch the last of that.

Q In order to have a sentence set aside at some later date, isn't it necessary under Louisiana law, at least at the time, to have originally been sentenced under provision 893?

A I'm not sure. I think probably so. But I think if a sentence was erroneously set originally and they recognize it, it could be brought up to be set aside or resentenced with the discretion of the court. But generally, I think it would be done in 893.

Q Mr. Mamoulides, you've been watching the trial on C-SPAN, I think you testified earlier.

A Not all of them, not everybody.

Q Is that why you raised this argument, because you've seen this argument on C-SPAN?

A I'm sorry?

Q Is that why you've raised this argument, because you saw this argument on C-SPAN?

A Please, which argument?

Q In order to have a sentence set aside, you need to be sentenced under 893.

A I remember some instances where an illegal sentence was set and it wasn't recognized until later. Like someone was set on a case where they didn't allow for good time or something, and we would recognize it, or we were told later we would go back and say judge, this sentence, we didn't catch it, but he was set and it doesn't allow for this. And so with that, we make a motion.

Q Mr. Mamoulides, there's no indication in this case that Mr. Wallace was illegally sentenced by Judge Porteous originally, is there?

A I'm sorry?

Q There's no evidence in this case that you're aware of --

A No.

Q -- that Mr. Wallace was illegally sentenced by Judge Porteous when he originally sentenced him not under section 893? That was a legal sentence, right, as far as you know?

A As far as I know.

Q And if you want to have your sentence set aside generally, you need to be sentenced under 893;

right?

A That's one of the areas, correct.

Q The judge had the discretion to sentence him originally under 893 but didn't; am I right?

A Correct.

Q And in fact, at the time he sentenced him, Mr. Wallace had a pending drug charge against him as well; correct?

A I don't know that. You're telling me that, but okay.

Q But if he had a pending drug charge against him at the time, that might be one reason why the judge --

A Correct.

Q -- wouldn't sentence him under 893; am I right?

A Correct.

Q And isn't it also a provision of Louisiana law that in order to make use of 893 to set aside a sentence, it has to be done before the sentence has been served?

A As I recall -- it's been some time, but that's correct. I don't think you can change a sentence after they started serving the sentence under the Louisiana law. There's a separate

statute, I think, that did that.

Q And so if Mr. Wallace, in fact, had already finished his sentence, he wouldn't be eligible, even if he had been sentenced under 893; am I right?

A He wouldn't be eligible for what?

Q Even if he had been sentenced under 893, if he had already finished his sentence, he wouldn't be eligible for a set aside; correct?

A That would probably be correct.

Q It's fair to say, Mr. Mamoulides, that you had a fairly laissez-faire attitude about sentencing with judges? You pretty much left the sentencing to the judges?

A Yes. We did not participate unless it was something specific in a plea bargain that we were doing.

Q So in the vast majority of cases, whatever the judge said about sentence, you didn't quarrel with; am I right?

A It was his prerogative under the law to set the sentence.

Q In the vast majority of bonds, you didn't quarrel with what the judge set as a bond?

A Correct.

Q So if a deputy DA thought there may be some illicit purpose behind a sentence or an amending of a sentence but didn't have proof, it's not something you would overturn or contest, would it be?

A I probably wouldn't know about it unless he came and talked to me about it.

Q Were you aware that Mr. Reynolds, the deputy DA in the Aubrey Wallace case, in fact, went to the Metropolitan Crime Commission to raise an issue about Judge Porteous's --

A I'm aware of it now.

Q -- set aside of the conviction?

A I'm aware of it now since you said it and I saw it in one of the articles on C-SPAN.

Q Were you also aware that he ended up speaking to the FBI about his concern about how Judge Porteous handled this sentencing proceeding?

A If I did, I did. I don't remember the particulars, but that assistant, if he objected, all he had to do was go tell his supervisor or my appeals person if he objected to the -- being that it was illegal or something, he needed to tell somebody.

Q Isn't it true, Mr. Mamoulides, that your

policy was essentially let the judge do what the judge wants on sentencing in the vast majority of cases, wasn't it?

A That's not exactly what I said, but yes. The question is, we didn't interfere with sentencing, but if the sentencing was illegal and we knew it was illegal, the assistant knew, he would object, and we would then let -- notify the Court that we thought the sentence was illegal, or we would take a writ on it.

Q But if you didn't think it was illegal --

A Then we would not interfere.

Q Mr. Mamoulides, let me finish. If you didn't think it was illegal but you thought it was -- there may be some illicit motive going on, would you file a writ in a case like that?

A No, if it's not an illegal sentence, we have no right for a writ.

Q Would it be fair to say that if a deputy today just didn't like the sentence that a judge was giving, there was no point in raising that issue with you, because you were going to say let the judge sentence, that's his prerogative?

A If the assistant didn't like it, that's fine. That's exactly right. If it's illegal, he

should say -- object and notify us on it. All the assistants knew my policy. I would not try to second-guess the judge on sentencing. He could give someone 1 to 5, that's what the law said it, if he gave him a one or a five or he suspended the sentence, we would not interfere with that.

In Louisiana, if you want to know something about that, all the judge had to do was order a presentence investigation, and there would be a presentence investigation done for him by the parole department giving him all the facts, and then he had that evidence to use. That's why they had the discretion. If it was in the guidelines of the sentencing, if it was a violation of something.

Q But your general policy was let the judge do what the judge is going to do on sentencing; right?

A Let him do -- I don't know what you're -- my general policy is we would not -- I would not object or publicly say anything about a sentence that was legally done. Okay?

Q So unless the deputy could prove to you it was illegal or based on some illicit motive, you would say let the judge do what the judge is going to do?

A Why are you -- you keep asking me -- if it is an illegal sentence and we are aware of it, then we would take action. We would take a writ on it. If it was an illicit, what you're saying illicit, I wouldn't know that unless there's been an investigation or something and that comes out. But we wouldn't know that at that time. I have no way of knowing anything like that.

Q And your deputy DAs would know that your policy was essentially, within very broad confines on sentencing, let the judge do what the judge wants to do? Your deputies understood that?

A You keep trying to repeat my comment. The answer is yes, I would not interfere. The judge was elected, and he's the one that has the say so and the discretion on sentencing. Just like I wouldn't allow the judge to tell me what to charge. The DA would pick the charges, and once you put those to prosecute on and the ones we didn't prosecute on, that was our reasoning, and we would go forward. And so the judge couldn't tell me what to file charges on, and I wouldn't tell the judge what his sentence is if it was a legal sentence.

Q If you had known, Mr. Mamoulides, that the reason the judge was setting aside a conviction was

to do a favor for bail bondsmen, would you put a stop to it?

A If I knew and I thought it was improper, yes, if I could stop it, or we would investigate, or we would call for an investigation or something of that nature. If a judge was doing something wrong, taking money, that's a crime, and we would get involved if we could. Basically speaking, that would be a bribery situation, if that's what happened. We would call the detective bureau and report that something ought to be looked at. But the chances of me knowing that from something like this is very slim. Go ahead.

Q You testified earlier about the judge's reputation and character when he was on the bench. Would your opinion of his reputation or of his character change if you were aware that he had received $20,000 from attorneys appearing in his courtroom that he had been sending curatorships?

A Well, yes, I would not think that was proper. I would not know that --

Q Would that just be improper, or would that be illegal?

A When you're saying -- during the time that I was DA, if I knew that a judge was taking money

for giving --

Q Let me restate the question. If a judge is sending curators to lawyers and asking back kickbacks of a percentage of the curatorship money, in your view, is that illegal?

A No, it's not illegal. I think it would be something to look at.

Q So your view is it's not illegal to take kickbacks for sending court cases?

A It would be illegal for him to take money -- to give a curator to a lawyer with the lawyer understanding that he's going to get part of the fee of whatever he makes out of it. I think that would be illegal.

Q So if a judge sends curators to the lawyer and calls the law firm and says I want some of the curator money back, you would agree that's illegal?

A I think that would be illegal.

Q And if you knew that had happened, would that affect your opinion of Judge Porteous?

A If he did that, sure, I would not think that was proper.

Q You also testified that you thought that Judge Bodenheimer was a good deputy DA.

A He was a good deputy DA. When he was

prosecuting cases for me, he had some good cases and was effective in the courtroom.

Q And would you say he was also a good judge?

A Sorry?

Q Would you also say he was a good judge?

A I didn't have much contact with him when he became judge, but apparently his docket ran pretty well. Otherwise, I didn't spend much time with him individually. Whatever division he had, I would assume that. I had no complaints from my assistants on.

Q Because you had no complaints from your assistants about Judge Bodenheimer, you would say that both Judge Bodenheimer and Judge Porteous enjoyed a good reputation on the bench?

A From me, my standpoint, they had a good reputation from working with the district attorney's office and moving the docket and what have you. That's what my experience would be with them.

Q So when you say Judge Porteous had a good reputation, you're looking at it from the narrow confines of how it affected your office?

A Basically how he handled himself in criminal cases. I wouldn't be -- I wasn't in his

court, and we didn't have anybody in his courtroom in civil cases, but if he ran his docket, one of my supervisors, my assistants, if they thought that things -- we couldn't get cases done or he was interfering or something was happening, they would tell me. I would have some knowledge of that.

Q Do you still think that Judge Bodenheimer has a good reputation?

A No, not at all.

Q Are you aware Judge Bodenheimer pled to at least one count --

A Absolutely. I was shocked and embarrassed.

Q I'm sorry?

A I was shocked and embarrassed to know that he had done that.

Q Would you be shocked and embarrassed to know Judge Porteous had done similar things?

A If he did. I don't know that, but yes.

MR. SCHIFF: Nothing further, Madam Chair.

MR. TURLEY: Madam Chair, we just have a brief redirect.

CHAIRMAN MC CASKILL: Okay.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Mamoulides, as I mentioned earlier, I'm only going to keep you briefly. I just have a couple follow-up questions. First of all, in setting a bond, doesn't a judge usually inquire as to how much an individual has in assets? Isn't that one of the questions that is often asked?

A I don't know that, but I would assume if he was trying to set the bond, I'm sure there would be a bondsman there telling him what the man could afford or something of that nature, if he was trying to get a commercial bond put in place.

Q Because that's a highly relevant question in setting the bond amount, isn't it?

A Yeah. And of course, most of the judges, before they set the bond, if they have time in the daytime, they would talk with the police, what's the charge, what has he done, what's his background. They want to know as much as they could about the matter.

Q And when you told Mr. Schiff that sometimes prosecutors had what you called an illegal or erroneous sentence, you're talking about simply a sentence that was originally set that you -- that the prosecutors believe should be reset because it was not done correctly?

A Yes, that happened. Judges sometimes would make an error on a sentence that was technically illegal to make. Like they didn't -- failed to put in -- like an armed robbery, given 10 years without the benefit of parole or probation. Without saying that, so -- he left that out but the law said he was supposed to do it, we would catch that and ask him to amend the sentence and put the right thing in it.

Q Mr. Mamoulides, you've had lunch with federal judges, for example, have you not?

A Sure.

Q And when you've gone to lunch with federal judges, who has generally paid at those lunches?

A Whoever made the invitation. If I invited him, I paid. If he invited me, he paid. There's a couple of federal judges I've been knowing for many, many years. So it's whoever invited who.

MR. TURLEY: Mr. Mamoulides, thank you very much for your time today.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: Does the panel have any questions? No questions by the panel at all for this witness?

You may be excused.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: You may call your next witness, Mr. Turley.

MR. TURLEY: Thank you, Madam Chair. The defense calls Darcy Griffin.

Whereupon,

DARCY GRIFFIN

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you.

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Ms. Griffin, as you know, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Thank you for returning today for your testimony.

Could you tell me a little bit about yourself, your educational background.

A I have a bachelor of arts from Tulane University. I work for the Jefferson Parish Clerk of Court and have worked there for 25 years.

Q What is your current position, please?

A I supervise the criminal department.

Q For the entire court?

A Yes, for the 24th.

Q And what was -- how long have you had that position?

A From -- I'd say about 1998 to present.

Q And what was your position before that?

A In '86, I was training. In '87 to '92, I worked for Joseph Tiemann; from '92 to '94, Thomas Porteous; '94 to '98, Walter Rothschild, all judges of the 24th Judicial District Court.

Q And when you say you worked for them, who was your actual supervisor?

A My boss is John Gegenheimer, the clerk of court for Jefferson Parish.

Q So you were assigned to various judges' chambers?

A Correct.

Q Have you ever been interviewed by the FBI or other government officials in connection with this or related matters?

A Yes, I have.

Q How many times have you been interviewed?

A I would say approximately seven or eight times.

Q You worked, you said, with Judge Porteous from '92 to '94; is that correct?

A Correct.

Q So you were with him until he became a federal judge?

A Correct.

Q Okay. And what was your title while you were working with Judge Porteous?

A I was his criminal minute clerk.

Q What were your responsibilities as a criminal minute clerk?

A Setting the daily docket, handling any pretrial motions, arraignments, trials, anything that required a minute entry or anything that needed to be done by the judge.

Q Would it be fair to say you handled the paperwork for the criminal side of his docket?

A Yes. I maintained the record for the Court.

Q Was there also a clerk handling the civil side?

A Yes, there was.

Q Who was that?

A Jolene Acey.

Q Did you ever know Judge Porteous to set or adjust bonds?

A Yes.

Q Tell us a little bit about that process. How did it work?

A An individual would get arrested for a charge, whether it be burglary or theft, and a bond was set. The bond would be split occasionally.

Q Who would set the original bond?

A Any judge for the 24th.

Q Any of the judges sitting in that circuit?

A Yes.

Q Did the judges rotate the responsibility to act as magistrate judges?

A Yes, once a week. They had magistrate for one week.

Q For one week. And then how many judges were there in the circuit?

A 16.

Q So every 16 weeks, a judge would have responsibility to act for a week as a magistrate judge; is that correct?

A Correct.

Q And how would it work for a magistrate judge in terms of setting the bonds?

A An individual is arrested, and we had magistrate court in the morning between 8:00 and 8:30, 9:00. Bonds would be set according to the

arrest, the prior convictions of the alleged defendant. Or throughout the day, if they were arrested and they didn't make magistrate court, people would come in, whether it be a family member, an attorney, a bondsman, and say we have so and so arrested for this charge and we need a bond set.

Q In looking at -- in setting the bond, was the amount of assets that the individual had relevant in terms of the setting of the bond?

A I don't know. I couldn't answer that.

Q Did Judge Porteous sometimes act as a magistrate judge?

A Yes.

Q Did -- when he did that, did you accompany him at all? Did he go over to the courthouse -- I'm sorry, to the jailhouse?

A Jail, yes.

Q And he would do that every morning when he was acting the magistrate?

A Of that week, yes, sir.

Q Did you participate in that process?

A Yes.

Q He would need information about the individual who had been arrested. Where did he get that information?

A It was prepared at the jail by the sheriff's office.

Q And then he would set the bonds and then return to his normal duties as a judge?

A Correct.

Q Did some judges not enjoy the service as a magistrate judge?

A Absolutely. I would say none of them really enjoyed it.

Q Did any of them sometimes fail to perform those duties?

A I wouldn't know that.

Q Did Judge Porteous sometimes adjust bonds when he was not sitting as a magistrate judge?

A Yes.

Q And how would that occur?

A Someone would call or come to the office and say they had someone in jail and a bond needed to be set.

Q Was there any difficulty getting into the office and to Judge Porteous's office?

A None whatsoever.

Q There was sort of an open-door policy; is that correct?

A Yes, sir.

Q Are you familiar with the Marcottes?

A Yes, I am.

Q Were they -- did they ever receive special treatment in terms of their access to the judges' chambers?

A That, I wouldn't know.

Q What was your role when the judge was asked to adjust bonds? What was your role in terms of collecting information?

A I would call the jail and get the priors on the arrestee.

Q And sometimes you would do that. Would other people in the office also do that sometimes?

A I would think so.

Q Rhonda Danos would sometimes do that as well?

A I would assume so.

Q And what information would you get from the jail?

A Prior arrests or convictions -- and/or convictions.

Q What would you do with that information?

A Relay that to the judge.

Q And what would he do with it?

A Then he would determine how the bond would

be set.

Q Now, was that the standard operating procedure, that you would always check with the jail to get prior arrest records or convictions?

A Yes.

Q We talked about the Marcottes. Did you see them frequently or their representatives, employees?

A I would say probably so.

Q Were they -- can you estimate the percentage of bonds that they were responsible for during the time you were in Judge Porteous's office?

A No, I couldn't answer that.

Q Did you have contact with other bail bondsmen as well?

A Yes.

Q Did you ever see Judge Porteous -- did you ever know Judge Porteous to reject a request for an adjusted bond requested by a bail bondsman?

A Yes.

Q What about one requested by the Marcottes?

A Yes.

Q Did you, on occasion, go out to lunch with the Marcottes?

A Yes, I did.

Q Tell us about that.

A We went to lunch.

Q Was it just you and the Marcottes?

A Oh, no, no, no. Different staff members, whether it be division A, which was Porteous's division, or other divisions.

Q So there would be a number of staff members who would be invited out to lunch?

A Yes.

Q And do you know why they did that?

A No.

Q Did they ever ask favors from you or discuss bonds while you were having lunch?

A Not with me.

Q Did you ever see them discuss bonds with anyone else while you were having lunch with them?

A Not that I recall.

Q Okay. And who paid for those lunches?

A I would assume the Marcottes.

Q And you saw that happen with the staffs of other judges' offices as well; correct?

A Yes.

Q Did either Louis or Lori Marcotte ever give you cash?

A No.

Q Did they ever give you presents of any kind?

A No. Presents? No.

Q How about over Christmastime?

A Yes.

Q What kinds of things would you get at Christmastime?

A They would bring hams or turkeys or cakes to the office, to all the divisions, to downstairs, not just the divisions of court.

Q So would they bring them just to you --

A No.

Q Other people on the staff as well?

A Absolutely.

Q And to other people on the staff throughout all the judges' offices?

A Correct.

Q Did anyone in the bond business ever give you cash?

A No, sir.

Q Do you know who Adam Barnett is?

A Yes, I do.

Q Who is he?

A He was a bondsman or is a bondsman. I don't know for what company.

Q Did he ever give you cash?

A No, he did not.

Q Prior to working with Judge Porteous, you worked with Judge Tiemann?

A Correct.

Q And what was your job when you were working with Judge Tiemann?

A I was his criminal minute clerk.

Q Did you ever know Judge Tiemann to set or reduce bonds?

A Yes.

Q Did he handle them basically the same way Judge Porteous did?

A Yes.

Q He asked you to collect information about priors and convictions and so forth?

A Yes.

Q Did Judge Tiemann have the similar kind of open-door policy that Judge Porteous had?

A No, sir.

Q How was it different?

A Well, a lot of people hung out there, had coffee, used the jury room to talk. But he didn't have his door open always.

Q After Judge Porteous went to the federal

bench, you worked with Judge Rothschild?

A Correct.

Q Did he also set and adjust bonds?

A Yes.

Q And did you similarly collect information on arrests or convictions before you set those bonds?

A Yes, sir.

Q And was his manner of dealing with that about the same as Judge Porteous's? I mean, did he have an open-door policy? Did he frequently --

A No, he did not have an open-door policy.

Q That was a policy judge by judge it would differ?

A Correct.

Q I would like to ask you a little bit about the number of bonds that would be set in a year. Do you have any estimate of how many bonds Judge Porteous would set in a month, say?

A No, I have no clue.

Q We looked at records on bonds, and we picked a year, 1986. We estimated a total for that year for Judge Porteous of about 3,300 bonds for the whole year. Does that seem reasonable to you? High? Low?

A Him setting 3,300 bonds in a year?

Q Yes, bonds that he had set or adjusted, had anything to do with.

A I would think that would be a little low.

Q What do you think the number should be?

A Around 5,000.

Q For the year?

A Yes.

Q If I told you Judge Porteous had sent about 29 bonds in one month, would you consider that a high number? Low number?

A In one month, low number probably.

MR. SCHWARTZ: Thank you very much. I have no other questions.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. DAMELIN:

Q Good morning, Ms. Griffin.

A Good morning.

Q While you worked for Judge Porteous, your office was located physically in his chamber area; is that correct?

A I was the first office when entering his chambers, yes, sir.

Q So for the period you worked for him,

about three years, you were in his chambers?

A Yes.

Q And at that time you had indicated that there was 16 judges in the 24th Judicial District?

A Yes, sir.

Q And any of those judges could set bonds; is that correct?

A Correct.

Q And while you were working for Judge Porteous, did you see Louis Marcotte and Lori Marcotte, either separate or together, come into his chambers to have bonds set?

A Yes.

Q Okay. And along with Louis and Lori, did you occasionally see Jeff Duhon accompany the Marcottes?

A Yes.

Q And did you occasionally see Aubrey or Skeeter Wallace accompany the Marcottes?

A Yes.

Q And with respect to the setting of bonds by Judge Porteous, was your only function in connection with that to call the jail to obtain the prior arrests?

A Yes; correct.

Q Now, you had indicated with respect to Mr. Schwartz that Judge Porteous had, on occasion, rejected bonds for the Marcottes; is that correct?

A Correct.

Q Okay. How many?

A In a given day?

Q Excuse me?

A In a given day?

Q You recall him rejecting bonds. How many would you say --

A At least three or four.

Q Three or four over the period of time?

A Yes.

Q Do you recall the details of any of those?

A No, I do not.

Q Now, while you were with Judge Porteous in his chambers, is it a fact that you saw him go out to lunch almost every day?

A Yes.

Q Okay. And among the people that you saw him go out to lunch with, was Robert Creely one of the people he went to lunch with regularly?

A I don't know for sure who he went with. I know he left the office every day.

Q Okay.

A I'm assuming that he went with Robert quite often.

Q Okay. And what about Jacob Amato?

A Yes.

Q And what about Donald Gardner?

A Yes.

Q And what about Louis and/or Lori Marcotte?

A Yes.

Q Excuse me?

A Yes.

Q And while you were with Judge Porteous during that period of '92 to '94, did you, in fact, know that he had traveled to Las Vegas?

A I heard that he had, yes.

Q Okay. How many occasions do you recall him going to Las Vegas while you worked for him?

A Once or twice.

Q Okay. Who did he go with?

A I don't know.

Q Do you know if he went on either of those occasions with Louis Marcotte?

A Not to my knowledge, not specifically who he went with.

Q Do you know who paid for his travel to Las Vegas?

A No, I do not.

Q Okay. While you were with Judge Porteous, what type of automobile did he drive?

A He had a blue Cougar.

Q Old or new at the time?

A Old.

Q Okay. And to your knowledge, did the Marcottes do anything with respect to Judge Porteous's automobile?

A Yes.

Q What did they do, to your knowledge?

A I don't recall specifically what was done.

Q You said they did something to his automobile. What did they do?

A Whether they washed it -- I don't know the specifics. I know they were coming to get the keys or something like that.

Q You do remember that?

A Yes.

Q Okay. And you had indicated, I think, with respect to questions from Mr. Schwartz that you had, on occasion, gone to lunch with the Marcottes?

A Correct.

Q Okay. On one or more of those occasions, was Judge Porteous present with you?

A I don't recall him coming often. He may have been once, but when we went, generally, he was not with us.

Q But you do recall at least one occasion when he was --

A He may have been with us, yes.

Q Okay. And when you had those lunches, did the Marcottes pay?

A I would assume they paid. They invited us. So I would assume they paid.

Q Okay. And do you know an individual, an attorney by the name of Robert Rees?

A Yes.

Q Okay. And did Mr. Rees come by the chambers -- come by Judge Porteous's chambers on a fairly regular or frequent basis?

A Yes.

Q Okay. And do you know if Judge Porteous and Mr. Rees would go out to lunch on occasion?

A I do recall that they have gone to lunch -- they had gone to lunch before.

Q Okay. And you had mentioned that after you had worked for Judge Porteous when he went on to the federal bench, you had worked for Judge Rothschild; is that correct?

A Correct.

Q Okay. And while you were working for Judge Rothschild, would he deal directly with the Marcottes?

A No, he would not.

Q Okay. He would not?

A He would not.

Q Okay. What was his practice? In setting bonds?

A He would set bonds. He would -- the same practice. I would call, get the priors. He would set the bond. He would occasionally split bonds. He generally did not talk to bondsmen at all.

Q He wouldn't deal with the bondsmen?

A No, he would not.

Q And are you personally aware -- you've been in the 24th Judicial District for a number of years. Are you personally aware of other judges in the courthouse who refused to deal with the Marcottes?

A I don't -- I wouldn't say specifically the Marcottes. Some judges just didn't deal with bondsmen.

Q Who are those judges?

A We're talking many years ago. Judge

Sessing. I don't think Judge Horner ever did. Judge Labron. I'm at a loss right here. We're talking a long time ago.

Q Would those judges set bonds but work with the lawyers rather than the bondsmen? Is that the procedure that they followed?

A Correct.

MR. DAMELIN: Thank you, Ms. Griffin.

I have no further questions.

THE WITNESS: Thank you.

MR. SCHWARTZ: We have no redirect.

CHAIRMAN MC CASKILL: Any questions of this witnesses from the panel?

Thank you. You're excused.

MR. TURLEY: Madam Chair, the defense calls Henry Hildebrand.

CHAIRMAN MC CASKILL: In a moment of synchronization, both sides have exactly six hours and 14 minutes.

Whereupon,

HENRY HILDEBRAND

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you, Mr. Hildebrand.

MR. AURZADA: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. AURZADA:

Q Can you tell the panel your current position.

A I'm currently serving as the standing Chapter 13 Trustee in the Middle District of Tennessee, also the standing Chapter 12 Trustee in the Middle District of Tennessee, and I have a small private practice.

Q And how long have you held your position as the standing Chapter 13 Trustee?

A I was appointed Chapter 13 Trustee in 1982, the spring of 1982, and I've held it continuously since then.

Q By my math, that's about 28 years?

A That's about right.

Q How many cases have you handled in that time, do you think?

A It's probably in the neighborhood of 150,000 individual consumer Chapter 13 cases and then probably about 100 Chapter 12 cases.

Q On an amount that you distributed to creditors, how much do you, in gross, distribute, and how does that compare to other trustees around

the country?

A My trusteeship disburses -- we will disperse this year approximately $165 million, which is close to what we've dispersed annually for the past several years. It's grown since I became trustee. I started out with about 1,800 cases, and I'm now administering just under 14,000 active Chapter 13 cases. I distribute more money, according to the United States trustee records, more money than any other individual trustee.

Q And have you testified before Congress before?

A I have. I've been -- I've testified before both the House and the Senate subcommittees dealing with the bankruptcy reform. This started back in the 1990s, and I've testified about five times, I think.

MR. AURZADA: Madam Chair, I would request that Mr. Hildebrand be recognized as an expert.

CHAIRMAN MC CASKILL: Is there any objection to the recognition of this witness to give expert testimony?

MR. BARON: Madam Chair, could we define what his expertise is? On what?

MR. AURZADA: It would be with respect to

matters involving Chapter 13 bankruptcy cases, Madam Chair.

CHAIRMAN MC CASKILL: Do you accept him as an expert on matters in Chapter 13 bankruptcy cases?

MR. BARON: Yes.

CHAIRMAN MC CASKILL: He will be accepted for the purpose of giving expert testimony in the area of Chapter 13 bankruptcy cases.

You may proceed.

MR. AURZADA: Thank you, Madam Chair.

BY MR. AURZADA:

Q Just for general purposes, can you describe the Chapter 13 bankruptcy process from the trustee's point of view?

A Chapter 13 provides to individual debtors, individuals or joint debtors who are married, the opportunity as an alternative to Chapter 7. In lieu of the liquidation of nonexempt assets in a Chapter 7, a debtor proposes a repayment plan on a voluntary basis in which they repay creditors as an alternative to losing their property.

It gives them the opportunity to cure defaults. It gives them the opportunity to assume or reject contracts. It essentially was created starting in the '30s with the Chandler Act as an

alternative to the liquidation bankruptcy.

As such, it's designed to be a better alternative for both the debtor and creditors. A material and important part of that is the fact that Chapter 13 is the bankruptcy that is supervised by a trustee who monitors the process, both making -- just kind of shepherding the case through, presenting the case to the judge or sometimes opposing the case, sometimes supporting the case, and then if the plan is approved, then administering the case, administering the plan under the directive of the bankruptcy court.

Q You had mentioned this is a voluntary process. Can you describe what you mean by that?

A Chapter 13, by being voluntary, allows a debtor to drop the program at any time. I suppose it's an acknowledgment of the 13th Amendment. But Chapter 13 just essentially is committing a debtor's future income to repay debts, and as such, we're talking about the earnings that they make, their income, and rather than be compulsory, be mandatory for an individual, they can elect to participate, or they can elect not to participate.

Q And if the debtor fully participates, what's the end result?

A If a debtor proposes a plan which is confirmed by the bankruptcy court and then performs under the plan, at the conclusion of the plan, that is, only after the debtor has accomplished all of those things set out in the plan, the debtor can then receive a discharge, and that discharge, by the way, in Chapter 13 is really the only chapter where the debtor has to perform everything before they get the discharge. In the other chapters, it doesn't exactly work that way.

Q Is the Chapter 13 process an easy process?

A I believe that Chapter 13 is an extremely complicated process, and that's been borne out by the work and the effort that people undertake to do Chapter 13. I have a great deal of respect for the individuals, the families that successfully complete a Chapter 13, because it does involve sacrifice.

The initiation of the process in a Chapter 13 requires the completion of an enormous number of forms that are fairly complex. They are more forms for most people than they've even seen in a tax return.

They customarily will rely on assistance of a professional who, in 19 -- I'm sorry, in 2005, we designate those as debt relief agents under the

SIPA law. But ever since I've been trustee, the successful cases have been represented by professionals because it's very difficult.

Q And when you say "represented by professionals," who are you talking about primarily?

A Primarily attorneys and attorney generally that limit their practice to representing either debtors or creditors and do the consumer practice work. In doing so, they have become aware of the various provisions of the forms, the hidden parts of the forms, and can assist a debtor. So professionals are very important. In my experience, there have only been five pro se debtors that have successfully accomplished Chapter 13 from the start to the end, and that's out of that 150,000 cases. Of those, four of those were attorneys who filed their own cases.

Q So this is not a process for the ill-advised?

A That is correct; that is correct. But it's also -- as I mentioned, it's sort of the mulligan chapter in bankruptcy, because a debtor is allowed to leave. If a debtor decides they don't want to be in the Chapter 13, if a debtor decides the payments are not appropriate, if something

changes in the debtor's life, then the case can be voluntarily dismissed by the debtor. If the debtor can't make the payments, if the debtor is economically fragile, as most Chapter 13 debtors are, then the case is often dismissed as a result of the debtor's noncompliance with the plan. And that is why many cases do not reach a discharge when they start in Chapter 13.

Q And that's the second leg of the difficulties you talked about, the first being filling out the forms, the second being actually completing what you say you're going to do?

A That is correct.

Q Okay. One of the things you said is that debtors rely upon advice for the hidden parts of the forms. What do you mean by that?

A The forms are fairly complex. Most debtors, when they're preparing the forms, or working with a professional to prepare the forms, are under severe economic distress, usually facing a foreclosure, repossession maybe of an automobile, garnishment of wages, maybe a potential lawsuit.

And almost all of the cases have something that is a pressing issue that is pushing on the debtor. And as a consequence, they're very anxious

to get the relief afforded by the automatic stay, and by doing so, they're in a hurry.

And they often don't read all the words. They often do not complete the bankruptcy petition accurately. Sometimes the professionals do not complete the petition accurately. That's been sort of the bane of my existence as a trustee, but it is a fact that I've had to come to grips with.

Q Okay. Now, for purposes of today's testimony, you've reviewed Judge Porteous's Chapter 13 case?

A I've reviewed a number of documents, and that would include the petition, the amended petition, the notice that was provided to creditors -- there was a copy of that in the record -- his Chapter 13 plan, the amended Chapter 13 plan, the schedule that he submitted, the statement of financial affairs that he has submitted.

I read the House report which has the facts that I would rely on in making that determination -- in determinations, the transcript of the meeting of creditors, the Chapter 13 Trustee's brochure that was provided, the application for attorney's fees that was submitted

by his counsel, and then the order that confirmed the plan, I relied on that, the final order of the trustee. I think that's most of what I --

Q Is it your understanding that the plan was confirmed based upon a finding that the best-interest-of-creditors test was met?

A Yes. He could not confirm a plan if it hadn't been met.

Q Briefly, that means Judge Porteous, under his plan, paid more to unsecured creditors than they would have received in a Chapter 7 liquidation?

A That's what the code requires. A bankruptcy judge cannot approve a Chapter 13 plan where the unsecured creditors do not receive at least what they would receive in a Chapter 7.

Q And in your review of the file, did Judge Porteous proceed as anything other than just an ordinary U.S. citizen?

A I read the file without any regard to what the position he held or what his educational background was. I've never met Judge Porteous. I read it as one of the 150,000 debtor cases that I've seen.

Q No special favoritism?

A Trustees try very hard not to show any

favoritism and avoid it, I think. I certainly don't know Judge Porteous. I couldn't have afforded him any favoritism anyway. But I looked at this as if it were just a Chapter 13 debtor. It's a debtor whose income was high relative to the incomes that we see. About 80 percent, 70 percent of my caseload, 75 percent of my caseload is below median income, and Judge Porteous was well above median income.

Q Right. He was making the salary of a federal district judge. Do you understand that the name on Judge Porteous's petition was either misspelled or intentionally made incorrect?

A I understand, based on the record, that the original petition filed did not have his correct name, nor did it have his physical address, it had a post office box.

Q Okay. And you understand that that error was made on the advice of counsel?

A I read that in the record.

Q Okay. Let's talk about notice to creditors. From your review of the file, can you tell if creditors got appropriate notice?

A From the file that I read, the notice that was issued to creditors, their first information

about the case, had Judge Porteous's correct name and his physical address.

Q And did it have his correct Social Security number on that? You may not know that.

A I don't know his Social Security number, but it had a Social Security number on it.

Q So by filing the petition and having the wrong name on it, it was subsequently amended; is that right?

A That's what I understand, yes.

Q Do you think there was an intent to defraud the court?

A I think the result as opposed to the intent -- I am not sure what Judge Porteous or his counsel had in mind -- the effect of what happened is that the creditors received information concerning the correct name of the debtor, the address of the debtor, and, I assume, the accurate Social Security number for the debtor, which is disclosed.

So the important thing for purposes of a trustee is whether the parties who have a stake in the case, who have a vested interest in the case, the creditors, the other party for an executory contract, whether they receive adequate notice to

participate in the case, file a claim, assert a claim or contest the plan.

Q Is the -- well, are you, as the Chapter 13 trustee in your district, concerned with the effect that a petition has on the media?

A I'm sorry?

Q Are you concerned with notice to the media or to the news outlets?

A No, I do not concern myself with the newspapers. I've always found they can pretty well take care of themselves.

Q Now, do you have experience with petitions filed with incorrect names in your district?

A I do. I have seen a number of petitions that have filed with incorrect names or with not complete names in some cases, these deal with debtors who have been recently divorced, and all of their debt has been incurred under their married name, but they utilize a new name, which may be their maiden name, they go back to their maiden name, and they don't list on the petition the name that they used to have where all the debt was incurred. That's usually something we can correct and provide -- mandate new notice.

Occasionally, I've seen a situation where

an individual used only initials, even though they may be known by full names. And I'm thinking of one where a fellow was known as Charles, and his middle name was Henry, but nobody ever knew him as Henry. They knew him as Charles. But his petition was filed as C. Henry. We required that to be changed.

Q So the position you took for the remedial action, if you will, was just to have him amend the petition?

A It was -- well, amend the petition and provide specific notice to all parties in interest so that they knew the correct name and address of the debtor.

Q Did you feel that was sufficient?

A I did.

Q Did you notify the court that you did that?

A The debtor was required to amend that first page of the petition, and as such, that was notification of the court.

Q And that's what Judge Porteous did in this case; is that right?

A That's what the record seems to indicate. It seemed to me to be a long time between the initial filing and the time the notice went out, but

it was back in 2001 before we had bankruptcy noticing center.

Q And I think you will agree with me that the amendment was done 12 days later, but the actual first notice of creditors went out some time later? Does that sound about right?

A That sounds about right.

Q Okay. Now, I want to talk a little bit about the notion of the failure to disclose the pending tax return. Now, as you understand it, at the time Judge Porteous filed, he had filed his tax return and was waiting on an impending refund; is that right?

A That's what the record indicates.

Q Okay.

A He had completed his -- as I understand it, he had completed his tax return, had filed it, anticipating a tax refund. But at the date that the petition was filed, he hadn't yet received the tax refund.

Q Okay. Now, is this something you've seen Chapter 13 debtors do before?

A I've seen that quite a bit. That's a fairly common understanding by debtors. I've been trying to educate their attorneys that the

expectation of a tax refund is something that needs to be disclosed on schedule B.

The Chapter 7 trustees are also doing that by trying to intercept the tax refunds that aren't listed. If they're not listed on schedule B, they tend to not be exempted on schedule C, and as such, the trustees grab them, the Chapter 7 trustees do.

So we're following -- kind of educating the bar to do that. For cases that are filed generally between the 1st of January and the 15th of April, many debtors, many debtors do not list the tax refund.

Q And those are the same debtors that are represented by counsel?

A Almost always.

Q Okay.

A It does compel a follow-up at the meeting of creditors, and since the bankruptcy code was amended in 2005, the plan can't go forward. We're stuck until the debtor files that tax return and we can actually examine what they receive. So that gap where a lot of those discrepancies are present was cured by an act of Congress in 2005.

Q I'd like to look at Judge Porteous's Fifth Circuit testimony. We're looking at transcript

pages 83 to 84. I'm going to read you what Judge Porteous has previously testified about this tax return and see if you think this squares with some advice that may be given in certain districts, knowing there's a variety of -- the way these things are handled. The question was:

"Question: But nothing was mentioned on the return?" And that's referring to the 2000 tax return.

"Answer: No, I know I called my -- I called Claude when I got it. And by Claude, I met Mr. Lightfoot. I'm sorry.

"Question: You discussed that with Mr. Lightfoot?

"Answer: I did.

"Question: Did he tell you to put it on the return?

"Answer: No, no. I discussed that I received the refund, what should I do with it.

"Question: What did Mr. Lightfoot tell you?

"Answer: Said if the trustee didn't put a lien on it, put it in your account, but they may -- they may ask for it back.

"Question: But, Judge Porteous, that

schedule was signed under penalty of perjury?

"Answer: It was omitted. I don't know how it got omitted. There was no intentional act to try and defraud somebody. It just got omitted. I don't know why."

Do you think it's possible that there was a miscommunication with respect to how that tax return should be scheduled based upon that testimony?

A I believe that -- it certainly appears that way. In line 1, I'm assuming that "did he tell you not to put it on the return" was not on the schedules, I suppose, bankruptcy schedules.

If a debtor tells their attorney -- this is what most of us rely on, is that when you tell your attorney, your attorney will fix -- will cure the problem or try to cure the problem. And if he did tell his attorney that he had received a tax refund, it was the burden on the attorney, I suppose, to get that amended schedule B filed, which would put both the trustee and the court on notice that there had been an asset that hadn't been listed.

Q Let's talk about that. If there was an asset that hadn't been listed, what would -- and the

attorney brings that to the trustee's attention, what's the trustee's likely reaction to that?

A The trustee's response is to first examine, I think, the impact of 1325.A.4, which has to do with what you mentioned is the best-interest-of-creditors test. That is, assuming I recover this asset that wasn't previously disclosed, then what impact would that have on the debtor's plan.

Remembering that assets, property of the estate, doesn't necessarily have to be committed to the trustee in order to effectuate the plan, the debtor must propose a plan that requires, in the most part, future income to supplement or supplant, rather, the assets that the debtor has, so that they don't give up their house; they pay the equivalent of the equity in the house to creditors. They don't give up their car; they pay the equity of the car over a period of time.

And in the context of a tax refund, which happens for a quarter of my cases, the ones that are filed in the beginning of the year, the debtor doesn't necessarily give up the tax refund even if it's not exempt, but they have to pay their creditors the equivalent value of that tax refund.

Now, I may question as to whether their budget was correct or under the new law whether their disposable income was properly calculated based upon what their actual taxes were as opposed to their refund. But generally, a trustee will examine the best-interest-of-creditors test and the asset value for purposes of confirmation of a plan.

Q I want to talk about some other mistakes that were in this bankruptcy filing. Generally speaking, how often is it that you see a perfect Chapter 13 filing?

A I don't know that I've ever seen one. There may be several that are out there, but I know that the committee here, the Senators are aware of Judge Rhodes's study where he examined the bankruptcy petitions in the Eastern District of Michigan and discovered that nearly 99 percent contained errors of some kind. And I think that's fairly -- I would like to think that Tennessee debtors are not quite that erroneous, but there's quite a few. Most of them are immaterial.

Most of them just don't have the weight of materiality to them that makes a difference. But there are errors in virtually every petition.

Q Do you think if you drilled down and you

thoroughly investigated Chapter 13 filings beyond what judge -- not judge, but what Professor Rhodes did -- I guess he was a judge. In his study, if you drilled down beyond just his spatial inspection, that you could find additional errors in most of the Chapter 13 --

A Quite a few of them. I could give you some examples.

Q Please do.

A The debtor's budget indicates all of their expenses, and oftentimes, we would see $25 listed as vet and pet expenses. But when you look on schedule B where it says pets and animals, the box is checked none.

So they're spending money for pet food without having pets. That's an error, or they're supplementing their food budget with pet food.

Or they make regular tithing contributions to their church, and they have done this for a long time, and this is on their budget, they've made contributions to the church. But when you look at the statement of financial affairs, where it asks for gifts that had been made, there's none. Either they just got religion when they filed bankruptcy or they made a mistake on the statement of financial

affairs.

Most of the time, they've made a mistake on the statement of financial affairs, and they can produce records from the church that shows they've been a longtime giver or tither. Those are the kinds of mistakes we see.

There's quite a few of them, debtors that have miscalculated their income. Even when it's on a tax return, they put a wrong digit down.

Sometimes they will put down their net income instead of their gross income minus the subtractions, which I think happened in this case. That's a fairly common mistake. Is it material? Not if the net income is accurate.

Q In evaluating mistakes that are made in Chapter 13 filings, as a trustee, do you think it's your job to investigate the good faith or the sincerity of the debtor?

A At the time of the filing of the petition, yes.

Q How do you do that?

A The examination of the debtor is a critical part of that. The meeting with the creditors where we have face-to-face questioning of the debtor on the record under oath provides a good

basis as to whether the assessment of the debtor is the debtor is gaming the system or whether the debtor is up-front and accurate.

We also rely a lot on what I call the X files. That's information that comes from X family, X spouse, X partner, X neighbor, and they provide a great deal of information. But when we discover that, we will dig into that.

But for the most part, what we see are debtors whose mistakes have been made have been made because they're under incredible financial stress. And they're dealing with attorneys who are pretty much doing a lot of cases, and they're cranking through a lot of cases.

Q What does that mean?

A Many attorneys, and very good attorneys, will handle 50 to 100 bankruptcy petitions in a given month. They do good work, but they're also dealing with a lot of different people with different situations.

For a debtor, the Chapter 13 is the only case they have, but for the debtor's attorney, it's one of 75 this month, and they have to deal with all of them. They're under an obligation both under the statute and under the rules of ethics to require

certain information to be given to their clients, and sometimes, it's hard to remember who you've talked to and what you've said when you have that many cases.

So it is -- and especially when you're dealing with someone who comes in and their wages are about to be garnished or their house is about to be foreclosed upon and they don't have much time to -- I think that the image that most people have of the financial records of a lot of debtors are they come into the debtor's attorney with a brown bag filled with envelopes and checks and put it on the table.

Q Once the plan is confirmed, trustees don't like to see post-petition debt, do they?

A I think that's a fair statement. No, not at all.

Q Why not?

A It does two things. One, in most cases and certainly in my district, there's a prohibition on post-petition debt except for medical emergencies or that might be allowed under section 1305, which would be consumer debt approved by the trustee.

But principally, it jeopardizes the success of the plan. If the debtor is incurring

post-petition debt, then the threat is that the pressure from post-petition debt will jeopardize the ability of the debtor to perform under the Chapter 13 plan.

So post-petition debt is both a problem in terms of living the straight and narrow, and the other problem is that it jeopardizes the plan.

I also believe that post-petition debt is a manifestation of a problem that hasn't been solved. It is my desperate hope that a debtor that sits across the table from me is only there to see me once and doesn't come back.

And the only way we can accomplish that is if they can learn something through the process and they don't make the same mistakes they made in the past. A debtor who uses check cashing or they use a credit card or get a credit card after they've filed a bankruptcy petition is engaging in behavior that indicates it may be an ongoing and chronic problem.

Q Now, if you discover one of your debtors has obtained a charge card and is using it, what are you likely to do?

A I'm going to seek dismissal of the case. I've never really deviated from that. If a debtor incurs debt post petition, I would seek a dismissal.

Q And in seeking dismissal, if they came to the hearing and said I'm going to cure this problem, would you put them on a strict compliance order and give them a chance to finish their plan?

A Generally, if they have an explanation, at the hearing, I would agree to essentially a drop-dead order, strict compliance order, if they showed that they now understood the importance of complying with the court order and they understood that it jeopardized their future, their performance under the plan and their performance financially.

Q Are there actions that post-confirmation debtors take to take on debt that are hard to discern as being debt?

A A lot of debtors in Tennessee -- and I'm not sure where else in the country -- are drawn in by the payday loan and the title pawn. Many of them somehow don't think of it as debt.

A lot of them go to the rent-to-own industry and don't think of it as kind of incurring an obligation, because they're told by the rent-to-own people don't worry about it, if you can't pay it we just take back the TV. So it does create a problem, yes. In my district, which has a large military base, that was a severe problem

around the military base.

Q Now, there's been a lot of talk in this case regarding the use of markers post-confirmation and determination of whether or not those are debt.

I take it that your opinion is probably that they are debt; is that right?

A That is my opinion.

Q From reviewing the record, specifically the dissent from the Fifth Circuit judicial panel, do you understand that reasonable minds could differ on that point?

A And I listened to what Professor Pardo had to say, the nature of this and the nature of a contingent liability pending presentment. I understand how that hair could be split, yes.

Q I'd like to read you some testimony again from Judge Porteous. I'm looking at House Exhibit 10. I believe it's page 158 of the transcript. Starting with an answer by Judge Porteous: "Well, did I sign $8,000 worth of markers? We have records that suggest I did that. I agree with you" -- and the answer, the issue is that we haven't -- I have an issue with whether that's credit. The statement itself says it acts like a check against your account. Now, I did not have an $8,000 line of

credit at -- where was that? Treasure Chest?

"Question: Treasure Chest. I didn't ask you about a line of credit, though.

"Answer: I understand, but I'm explaining to you why that's misrepresentative.

"Question: Okay, well --

"Answer: Those are just repetitive 1,000. Had I written a check for 1,000, I do not believe I would have been in violation of any court order."

Is this indicative of someone who thinks there may be a reason to believe they're not taking out debt?

A I guess I would -- this is the kind of lack of sophisticated understanding of what it means to sign a check. Then I would take it that that would be consistent with someone that went to a we tote the note place or title pawn or a payday loan.

Q Those are exactly the types of post-petition debts you've seen debtors in your district --

A We do not have gambling casinos in Tennessee.

Q I was referring to the pawn loans.

A That's why I haven't seen a lot of cases with markers. But I equate that to giving the

payday loan a postdated check and then expecting that to not be debt for somehow -- some debtors do that. I have come in contact with that enough that my initial meeting with debtors includes on a video that I provide and slides that I show and in the booklet that I hand out that uses payday loans as debt and rent to own as debt -- and you can't do it.

Q Now, is it your understanding that in submitting a 2000 pay stub instead of a 2001 pay stub, there's a possibility that Judge Porteous understated his income on a net basis?

A I am aware of that.

Q It's a little bit less than $200 a month we're talking about; right?

A In the record I looked at, there was a schedule I, but there was also an older paycheck where the number corresponded to the number that was put on the schedule I. And from the House report where it indicated that he had been working with an attorney for several months and it provided information, it does show that the attorney took old data, old information and stuck that in the petition when he actually filed it. It's disappointing, but it's not surprising.

Q Do you think that was a material amount?

A $6,000 can be significant. It depends on the size of the case. But $6,000, which is about what it works out to over that 60-month period --

Q Is there a possibility that the judge could have asserted additional expenses equal to that amount?

A It's possible, but that would be pure speculation.

Q That would be speculation. But that would be a part of the negotiation process with Mr. Beaulieu, additional expenses could be --

A And remembering that Mr. Beaulieu objected to the confirmation of the plan because the debtor was not providing all disposable income to fund the plan. He opposed confirmation of the plan, which meant that there was going to be litigation in front of a judge as to what the expenses were.

Q So there was a cognizant decision to consider whether or not all of his disposable income was being contributed to the plan?

A That's correct.

Q Does the trustee have discretion in analyzing the schedule of income I against the schedule of expenses J?

A In 2001, the trustee always has the

decision to make as to when to bring something as a litigant to the court. Some trustees bring a lot of cases, and some trustees bring cases only where there's a material difference.

Sometimes, the cost of litigating the issue is far greater than the benefit that is derived. So in a cost/benefit analysis, a trustee has to make a business decision, a decision as to whether to pursue an objection to confirmation or to support confirmation or to take no position.

Q Now, Judge Porteous paid $52,000, a little bit more than $52,000 to his unsecured creditors. Is that a big plan?

A That's a pretty big plan.

MR. AURZADA: Madam Chair, may I have just a moment?

CHAIRMAN MC CASKILL: Yes.

BY MR. AURZADA:

Q Just a couple of wrap-up questions.

Mr. Hildebrand, you're not being compensated for your testimony here today other than reimbursement of your travel; is that right?

A That is correct.

MR. AURZADA: No further questions, Madam Chair. Thank you.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Mr. Hildebrand.

A Good morning.

Q My name is Alan Baron, and I'm special impeachment counsel for the House of Representatives in this matter.

Let me ask you this: You said that over the years you have had a supervisory role of about 150,000 Chapter 13 petitions and cases?

A That's an approximate number, but yes, sir.

Q Okay. How many times did you come across a case where the debtor and his counsel consciously agreed to use a false name -- we're not talking about typographical errors here. We're talking about a false name and a post office box in lieu of an actual residential address, conscious decision to hide who the debtor was, how many times did you come across that?

A Probably one or two.

Q In 150,000?

A Yes, sir.

Q Okay. What did you do about it?

A Made him do exactly as I said, had to renotice and refile the petition.

Q Now, you understand I'm not talking about somebody who used their maiden name or -- I'm talking about a conscious decision to lie under penalty of perjury in the choice of name and residential address that they gave down -- put down?

A When I asked the questions and when it came to the one or two cases that I can recall where they said we did this because we don't want the ex-husband to know or we don't want the bank to know or we don't want something to happen, my response was always fix the petition and renotify with the correct information.

Q Did you understand that -- or at least I understood you to say that your function is to focus for the purposes of the trustees, what effect would this have on a creditor; is that a fair statement?

A That's fair, yes, sir.

Q You understand, though, that this proceeding is an impeachment trial?

A Yes.

Q And its objectives may be quite different than to simply see whether a plan was confirmed?

A Oh, absolutely.

Q Would you agree with the Supreme Court -- I think the case was -- I think it's Local Loan Company, I think it's a famous case in bankruptcy circles, where they said that the protection of the bankruptcy process is for the honest but unfortunate debtor?

A Yes.

Q Do you agree with that concept?

A I do.

Q And you said in a given moment, you would have something like 14,000 cases?

A How many that are active right now that I'm administering.

Q Okay. Can you go back -- well, no, that's fine. Let's just use that.

Would you agree that without candor by the debtor, this fundamentally affects the operation of the bankruptcy law system?

A To the same extent of fundamental candor with the tax system, I suppose that's correct, yes. The history of the bankruptcy law that goes back to England recognizes that the discharge is the quid pro quo for assisting the creditors in obtaining the assets of the debtor, now I suppose the income of the debtor. So that still runs through bankruptcy

law since 1588 now right up until today, is that full disclosure is one of those key elements, as the quid pro quo for the discharge.

Q So the debtor who is not being candid with either assets or payments to -- who might want a preferred basis to other creditors, that person in a sense is corrupting the bankruptcy system?

A They should be denied a discharge.

Q With the principles in mind that we just talked about, the need for candor, the honest but unfortunate debtor, I want to run through some facts that I submit are established by the evidence, and I want to ask you a question about it.

First of all, the facts establish that Judge Porteous filed his initial bankruptcy petition on March 28th, 2001. Now, the day before, on March 27th, he paid off three markers in cash to the Treasure Chest Casino totaling $1,500. This transaction does not appear anywhere on his schedules, which he filed under penalty of perjury, and according to his bankruptcy counsel -- and by the way, he did have bankruptcy counsel throughout this -- he never knew about Judge Porteous's gambling activities.

Second, Judge Porteous, as we've started

to discuss, filed his petition on March 28th in the name of G.T. Ortous. The evidence establishes that this was suggested by his bankruptcy lawyer, Mr. Lightfoot, and Judge Porteous agreed, and he signed the original petition under penalty of perjury.

Judge Porteous also obtained a post office box, which he used as his residence address, not his mailing address, on that original petition, the March 28th petition, and this, too, was at the suggestion of his bankruptcy lawyer, and the evidence is Judge Porteous agreed to this and came back to his lawyer and give him the information about the P.O. box.

Now, Judge Porteous filed his year 2000 tax return, claiming a tax refund of approximately $4,100. That was on March 23rd, 2001, five days before he filed his original petition. That ultimately -- it does not appear on the schedules that he filed in his bankruptcy, which he filed somewhat subsequently, nine or 10 days later, and he never told his lawyer -- the testimony is from his lawyer that he never told his lawyer that he had filed for this tax refund.

And a few days after he filed an amended

petition, which was filed on April the 9th, he filed it on April the 9th. He gets this tax refund on April the 13th. He never tells his lawyer; it never appears on any schedule. This money just disappears.

Another fact, in conjunction with his amended petition, the pay stub that was submitted was from the year 2000. The pay stub at the time of filing in 2001 would have shown an additional $174 a month, but that current pay stub was never submitted.

Now, assuming the truth, that the evidence establishes what I have recounted here, in your view, is that consistent with the principles of candor, good faith, honesty on the part of the debtor?

A I think the question has to do with what would benefit the creditors in the case. If failing to indicate the existence of an asset would hurt the creditors, failing to list your income hurts the creditors, then absolutely oppose confirmation of the plan and seek dismissal of the case.

The question may be, though, is it possible to rectify any of those things, you know, whether they were intentional because they didn't

want a spouse to know or a bank to know or the press to know. I think that for the most part, most trustees would not oppose a debtor fixing the problem if they made a full disclosure.

The problem here, of course, is the disclosure wasn't made until the case was almost over.

Q I'm asking you for a slightly different perspective on this. Your professional perspective is, is it good or bad for the creditors?

A That's what I'm supposed to do, yes.

Q I understand that. But what I'm asking you, somewhat apart from that, is, you have to make the judgment of good faith and candor even as you're making the judgment of whether it's good or bad for the debtors. I'm asking for your judgment on the good faith and candor of the debtor, in this case Judge Porteous, given the facts that I've laid out for you.

A I'm missing -- one, it would trigger certainly questions whether the plan was proposed in good faith, and therefore, it would justify an opposition by the trustee for confirmation.

The second element of that, though, is confronting the debtor or questioning the debtor

with whatever information is available at the time of that meeting of creditors. If I were convinced that the debtor still was not coming up with candor, wasn't willing to come forward with the information -- if I found, for example -- take the example of the one the trustee clearly new about, which was the wrong name. Why was that done, and digging further into it -- and if, in fact, that demonstrated that the debtor was hiding other things deliberately and not coming forth with the truth to the trustee, then that would demonstrate you should oppose confirmation of the plan and seek dismissal of the case.

Q Is there ever an excuse for knowingly lying on a document that you're signing under penalty of perjury?

A No.

Q Thank you. Now, you know Judge Greendyke ultimately signed an order in this case confirming the plan. One provision of that order was that the debtor was not to incur additional debt thereafter.

A Paragraph 4 of the --

Q Paragraph 4. You sound familiar with it. Is that a form or a provision that you use in your --

A I have -- the judges have, in our form, confirmation or similar language. The debtor is enjoined from incurring post-petition debt except for emergency medical purposes or that may be allowed under 1305, which would require trustee consent.

Q Right. And you've been doing this for a long time. I assume you speak to your colleagues around the country. Is that a rarity, to have that petition in there, or is it fairly common?

A Fairly common.

Q Now, I'd like to put up Exhibit 10, is it, the excerpt from the Fifth Circuit. 5, sorry, Exhibit 5.

Do you see that?

A It's a little small to read, but yes.

Q Can we make it bigger?

A Thanks.

Q Do you see there that the Fifth Circuit concluded that a marker is a form of debt, no question in your mind?

A I agree with that.

Q Do you also understand that Judge Porteous agreed with that in his testimony before the Fifth Circuit?

A I'm aware of that, yes.

Q Okay.

A I didn't disagree with what he said to the Fifth Circuit when he acknowledged that.

Q Right. The evidence establishes that subsequent to the time that the order was entered by Judge Greendyke, Judge Porteous took -- I believe the number is 14, gambling excursions of various kinds to casinos and took out -- I believe the number again is 42 markers, involving thousands of dollars, some of which was paid back the same day, some of which was not paid back the same day.

In your view, is that a violation of the court order?

A Yes.

Q The evidence also establishes that Judge Porteous took out a new credit card subsequent to the order without getting permission.

Does that violate the court order?

A Yes.

Q Will you agree with me again that the basic principle of the bankruptcy laws is that it depends on full disclosure by the debtor, good faith?

A Oh, I do agree with that. It's clear that

in enactment of the law in 2005, Congress was responding to the kind of problem that this case represents, and that is the lack of veracity and accuracy in schedules and statements. That SIPA includes a provision where the tax return must be submitted to the trustee seven days prior to the meeting of creditors.

The new law requires that pay advises be given to the trustee prior to the meeting of creditors. The new law requires that the debtor receive information concerning credit counseling before filing the petition.

And now there's a mandatory random audit of one out of, I think, every 250 cases. That was in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It seems to me that that was in response to the kinds of things that we've seen -- that I've seen since 1982.

Q You've seen some instances where the Chapter 13 debtor was an attorney?

A Yes.

Q Did you ever have an occasion to report an attorney to the state bar for disciplinary action related to filing a false petition?

A A false petition, no. I've had occasion

to report attorneys for not adequately representing their clients, but not for filing a deliberately false petition. I have turned in a couple of attorneys for, I believe, deliberately misstating information on the petition, but I did that to the United States trustee and not to the disciplinary board.

Q So where an attorney deliberately misstated information on a petition, you felt that was serious enough for you to take action, and referring it, did you say, to the U.S. trustee?

A To the U.S. trustee, yes, sir.

Q Is that a penultimate step to ultimately referring it to the U.S. Attorney for prosecution?

A Yes. It's a step that I have to take before -- I don't have direct -- I don't make a referral directly to the United States Attorney. I had an occasion where one attorney forged my name, and we became very active in prosecuting that attorney, but that wasn't in -- it was tangentially related to a bankruptcy case.

Q That interests me.

A After 27 years, you see a lot.

Q I'll bet. Let me know more about that, if I may. The lawyer falsified your name on a petition

of some kind?

A No. It was on a check.

Q I'm sorry?

A It was on a check. There was an interpleader action by an insurance company in the United States District Court. When the district judge discovered that the beneficiary was in bankruptcy, he ordered the funds to the clerk be released to the bankruptcy trustee, since -- believing the bankruptcy court was in a better position to deal with who owned the money.

And the clerk erroneously sent the check payable to the bankruptcy trustee to the debtor's lawyer, who decided it was kind of found money and then endorsed the $315,000. And only when creditors began asking me for where their money was did I trace it back and discover that he had forged my name. He was subsequently disbarred and convicted, got a 36-month sentence.

MR. BARON: Thank you. Nothing further.

REDIRECT EXAMINATION

BY MR. AURZADA:

Q Mr. Hildebrand, honest debtors are entitled to a fresh start. I think that's the point; right?

A It's kind of a mantra that people have used. Congress has used it in the reviews. But that's the quid pro quo that goes back to the statute of Van back in the 16th century.

Q Right. But is that standard precaution?

A It can't be, because so many petitions are not perfect. The question again goes back to is it a material mistake or is it not.

Ignoring the fact of who a debtor is and just looking at did he tell the truth, or she tell the truth and you find no, then you have to dig further. And a lot of this is done just by the examination, the one-on-one examination done at the meeting of creditors to see if it's a mistake, just a mistake, or whether there's something else going on, deliberating concealing assets, deliberating hiding stuff.

One of the things that makes a trustee, Chapter 7 and Chapter 13, fairly effective, and it goes with prosecutors as well, federal and state prosecutors, is the ability to quickly discern whether somebody is being up-front with you or not.

And I think that in the brief time we have in meetings of creditors, coupled with the schedule of statements, documents prepared, and any history

that we have, we can do -- I think trustees do a pretty fair job of that.

Q So the panel is clear, when you're looking at your debtors, perfection is not the standard by which they are judged?

A If perfection were the standard, I don't think many people would have their plans confirmed.

Q And we're talking about millions of people a year; right?

A Approximately 1.5 million families will be filing Chapter 13 this year.

Q I want to show you another excerpt from testimony in the Fifth Circuit.

This is at transcript page 150, if we can blow that up, please.

When questioned by the Fifth Circuit:

"Question: Judge Porteous, if you had all this to do over again, would you have filed different financial disclosure statements?

"Answer: Likely, Judge. I mean, maybe now in hindsight some of it was -- should have been included. The debt was -- the failure to list the correct debt, that was right after the bankruptcy. It was like the end of the world. I mean, my wife was nervous, a wreck, upset. My finances were all

over the paper. Everybody in America knew my finances. It was just inadvertence, not any intent to hide my finances."

Does that sound like the testimony of a typical Chapter 13 debtor?

MR. BARON: I'm going to object. The document, I believe, relates to financial disclosure forms, not --

CHAIRMAN MC CASKILL: We can't hear your objection because the microphone --

MR. BARON: I believe that the document that's up there relates to the financial disclosure forms that he files as a judge rather than the schedules and other documents that are filed in connection with the bankruptcy.

MR. AURZADA: Your Honor, if -- I think I should withdraw the question on that. Thank you.

CHAIRMAN MC CASKILL: Anything else for this witness?

Any questions from the panel for this witness?

You may be excused. Thank you so much.

THE WITNESS: Thank you, ma'am.

MR. TURLEY: Madam Chair, the Defense would like to call Judge Ronald Barliant.

CHAIRMAN MC CASKILL: So the parties know the time, Judge Porteous has five hours, 35 minutes, and the House team has five hours, 58 minutes.

Mr. Barliant, would you raise your right hand, please.

Whereupon,

RONALD BARLIANT

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you, Judge.

DIRECT EXAMINATION

BY MR. WALSH:

Q Good morning, Judge Barliant. For the record, I'm Brian Walsh, one of Judge Porteous's attorneys.

A Good morning.

Q Could we call up Exhibit Porteous 1098, please.

Is that exhibit your CV or your law firm bio more particularly?

A Yes, it is.

MR. WALSH: We would offer 1098 for the record at this time.

CHAIRMAN MC CASKILL: Is there any objection?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: The record will be received.

(Exhibit Porteous 1098 received.)

BY MR. WALSH:

Q You received your law degree from Stanford in 1969; correct?

A Correct.

Q And in 1988, you were appointed as a bankruptcy judge for the Northern District of Illinois; right?

A Correct.

Q Your chambers were in Chicago?

A That's right.

Q You served as a bankruptcy judge for more than 14 years; is that right?

A Right, 14 years, nine months.

Q And since leaving the bench, you've been a member of the Goldberg Kohn law firm in Chicago?

A That's correct.

Q You practice in the area of bankruptcy since leaving the bench?

A That's correct.

Q Are you a fellow in the American College of Bankruptcy?

A Yes, I am.

MR. WALSH: Madam Chair, we would offer Judge Barliant as an expert in matters of bankruptcy law.

CHAIRMAN MC CASKILL: Is there any objection?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: The witness will be received as an expert.

BY MR. WALSH:

Q Sir, are you being compensated for your testimony here today?

A No, other than having travel expenses reimbursed.

Q Okay. Could you tell the committee, in general terms, what you reviewed to prepare for your testimony today?

A I believe I reviewed most, if not all, of the documents in Judge Porteous's bankruptcy case, the ones that were in the docket. I reviewed some testimony. I reviewed the -- the House pretrial statement, Judge Porteous's statement, the articles of impeachment, and I'm sure some other documents.

Q Okay. Let's talk about what a judge does in a Chapter 13 case. When you were a judge in

Chicago, you had Chapter 13 cases assigned to you; right?

A That's correct.

Q About how many Chapter 13 cases did you have on your plate at any one time?

A At a given time, it would be in the thousands, probably 2- to 3000.

Q And is it your understanding that's typical for judges in the larger cities?

A It is, yes, that is my understanding.

Q Does the judge in a Chapter 13 case have any role in the administration of the case?

A No.

Q In what -- what sort of circumstances would occur that would cause the judge to have an active role in a particular case?

A The Bankruptcy Code adopted in 1978 made it clear that the judge's role, primary role, was to resolve disputes brought before the judge. Other entities and persons had responsibility for administration.

So typically, with a couple of exceptions, the judge's involvement in any bankruptcy case, but in a Chapter 13 in particular, would be limited to disposition of a motion or some other kind of a

contested matter.

Q Is it fair to say that before the judge has something to decide, first one party has got to decide there's here that's worth fighting about?

A There has to be a dispute, so somebody has to decide there needs to be a dispute, yes.

Q And then the other party has to decide it's worth disputing rather than conceding?

A That's correct.

Q Do disputes frequently settle before they make it to hearing before the judge?

A Very frequently. A huge majority of them do.

Q From the perspective of the judge, how important is the judgment exercised by a Chapter 13 trustee?

A Well, I guess the answer is extremely important, because -- and because the judge doesn't get involved in the administration of the case, in the sense at least the judge is relying upon the trustee to bring issues, problems, to the judge's attention.

And clearly relying upon the trustee in confirming the plan, which is one time when the matter comes to the judge or at least the judge's

staff without a dispute usually. And the judge relies, in that instance, on the recommendation of the trustee.

So to the extent you might say the judge has a stake in the system, the judge is relying very extensively on the Chapter 13 trustee.

Q What happens if a trustee identifies an issue, reviews it and concludes that it's not material?

A Very unlikely the judge would ever hear about it.

Q Is that an inappropriate thing for a Chapter 13 trustee to do?

A No, that's a very important part of the job.

Q As a judge, did you want trustees bringing matters before you that were trivial or insignificant?

A No, I certainly would not have.

Q What would happen if trustees brought every issue to your attention?

A Well, if I found they were trivial, I probably wouldn't take any action with them and might not -- I might use firm words with the trustee, that this is the kind of thing that should

have been resolved before it was brought into court and before the debtor and the debtor's attorney were required to appear in court.

Q You mentioned the concept of a confirmation hearing in a Chapter 13 case. So let's talk about how that works.

Is it typical for a bankruptcy judge to schedule a number of Chapter 13 confirmation hearings on a single calendar?

A Right. Certainly -- I'll talk about my district, which I think is relatively typical. But certainly, that's correct in my district. There would be a fairly extensive confirmation call on what we call a Chapter 13 day.

Q About how many cases would be on the calendar on Chapter 13 day?

A For confirmation?

Q For confirmation.

A It could be dozens.

Q About how many cases of those dozens might actually percolate up to you to resolve, to make a decision?

A Well, in my case, my staff would have -- once the trustee submitted the plan and his recommendation and proposed order, if there were no

objections, they would have gone through my chambers. And we had -- those kinds of we look for. If we found those, the order would just be entered.

I think they're asking what kind -- how many actually came to my attention for purposes of resolving some sort of an issue.

Q Exactly?

A That would be very few. That might be three to a half dozen on a particular day.

Q Okay. We talked about how issues might resolve themselves, and I want to just cover a couple things that are in the record in this case.

Could we put up Porteous Exhibit 1100(h), please. And this is a copy of the amended schedule filed by Judge Porteous.

Is it typical for certain types of objections to confirmation to be resolved by the filing of an amended schedule by a debtor?

A Oh, yes. Bankruptcy rules permit the free amendment of schedules. Although I'm not on the rulemaking committee, I assume the reason is because it's very frequent that schedules are amended to correct some sort of a problem.

MR. WALSH: Madam Chair, I don't believe we have 1100(h) in the record, so we would offer it

at this time.

MR. BARON: No objection.

CHAIRMAN MC CASKILL: There is no objection. It will be received.

(Exhibit Porteous 1100(h) received.)

BY MR. WALSH:

Q Similar question, if we could look at 1100(i), please. This is a copy of the amended plan filed by Judge Porteous and his wife.

Is it -- is it common for certain types of objections to confirmation to be resolved by the filing of an amended plan?

A That's correct. The debtor files the plan, and if they're -- I take it from the record it happened in this case. If there is an objection by the trustee or somebody else, it's very frequent to just resolve that objection by filing an amended plan, which again is --

MR. WALSH: Madam Chair, we would similarly offer 1100(i) at this time.

MR. BARON: No objection.

CHAIRMAN MC CASKILL: It will be received.

(Exhibit Porteous 1100(i) received.)

BY MR. WALSH:

Q You mentioned the concept of a trustee's

recommendation regarding confirmation, so if we could put up 1100(o) on the screen. And that document is the trustee's summary and analysis in Judge Porteous's case.

And let's look at page 2 and zoom in on paragraph 8, please. And that's the particular recommendation at issue here.

If the trustee recommends confirmation of a plan, as happened in this case, and no other creditors object, would it be typical for a confirmation order to follow?

A Yes.

Q Can you recall during your time as a judge denying confirmation of a plan without an objection having been filed?

A No, I cannot.

Q In cases where there were no objections to confirmation, did you as the judge spend a lot of time digging into the file before entering a confirmation order?

A No, I would not have done that.

MR. WALSH: Madam Chair, we offer 1100(o) at this time.

CHAIRMAN MC CASKILL: Is there any objection to 1100(o)?

MR. BARON: No objection.

CHAIRMAN MC CASKILL: It will be received into evidence.

(Exhibit Porteous 1100(o) received.)

BY MR. WALSH:

Q At the end of a Chapter 13 case, after debtor makes all payments required under the plan, we get to a point of discharge; is that correct?

A That's correct.

Q As the judge, how would you learn that a debtor had completed all of the payments required under his or her plan?

A Discharge order is typically entered out of the clerk's office. So there would be a record that would appear on my docket showing that a discharge order had been entered.

But the reality is unless there was some sort -- again, unless there was some sort of dispute, in the case of a Chapter 13 discharge, that was very, very rare, I would not have particular knowledge that a debtor had received a discharge.

Q And you described the process -- you described that the clerk's office exercises that function. Is that process triggered by the filing of the trustee's final report?

A That's right. Again, the trustee triggers the process, as you said.

Q Would you as the judge again dig through the debtor's file to determine whether a discharge should be entered?

A No.

Q Let's talk about what happens when there are hiccups in Chapter 13, if I can use that term colloquially. As a judge, did you see creditors file motions for relief from the automatic stay, arguing that the debtor had missed a payment or two?

A Very commonly.

Q Did you see motions to dismiss Chapter 13 case filed by trustee or someone else because a debtor had missed a payment or two?

A Yes.

Q And what is the typical resolution of motions like that if the facts show that the debtor has missed one or two payments?

A Well, the most typical resolution is what you mentioned before, which is that they're resolved usually moments before the attorneys step up to the podium. But I'm assuming you're asking if they actually go to a hearing.

And if it's a first -- first occurrence of

the particular problem, failure to make a payment on the mortgage or failure to make a payment on the plan or whatever it is, most typically, if the debtor is prepared to cure that default, either the motion would be denied upon the cure of the default or the motion would be granted with conditions.

In other words, if the debtor cured that default and stayed current in the future, then the stay would remain in effect or the case would not be dismissed. I should amend myself.

I don't like those kinds of orders dealing with dismissals of cases. I don't think there should be a -- what you're getting to, a drop dead order. And I don't think there should be a drop dead order in the case of dismissal.

But in the case of modification of a stay, that's very common, to just say so long as the debtor stays current, the stay will remain in effect. If he defaults, then the stay would be modified.

Q And you mentioned the drop dead order, and Mr. Hildebrand mentioned that also. Can you tell the court what's the general concept of a drop dead order?

A If a debtor has -- this is probably the

second time, strike two. If it's strike one and the debtor cures, I'd probably just deny the motion or, more likely, the motion would get withdrawn.

If the debtor has done it again and it's not terribly serious, I would have very likely entered an order that says cure this default, stay current in the future, in other words make your payments on time in the future, and if you do that, fine. If you don't do that, then nobody has to come back to court again, something has to get filed but nobody has to come back to court, the stay would be modified and the creditor could exercise remedies.

So you have -- that last one would be strike three.

Q Okay. And if -- in the strike two phase, as you described it, as the judge, is it preferable to grant relief from the automatic stay upon strike two, or is it preferable to do the sort of drop dead order that you described allowing for the possibility --

A The answer to that is most creditors -- maybe most -- a significant percentage of creditors themselves propose drop dead orders. Don't forget, the idea behind Chapter 13 is to get creditors paid and debtors discharged.

So creditors have a stake. It's not as adversarial as I think some people believe.

So it is, in my view, frequently, if not most of the time, a good idea to give the debtor another chance to catch up and accomplish the purposes of Chapter 13.

Q Let's talk about some other issues. There have been some assertions in this proceeding that if a debtor gambles after a bankruptcy filing, that would violate Section 363(b) of the Bankruptcy Code, it would be outside the ordinary course of business. Do you agree with that?

A No, I don't. 363 is the section of the Code that deals with property of the estate and what the trustee, in the words of the -- of Section 363, trustee, may do or not do with property of the estate.

Although there's a cross-reference -- there are cross-references in the -- in Chapter 13, as a general matter, and specifically by statute in Chapter 13, it's the debtor who has possession of his or her assets. And the trustee has virtually no authority over property of the estate.

It's a long way of saying that the 363(b) really wouldn't have any significant application in

a -- in a Chapter 13 case.

Q Okay. Let's talk about another suggestion that we've heard in this and prior versions of this proceeding, and that is that the debtor has an obligation to update Schedule I, the income schedule, if the debtor experiences a change in income after the bankruptcy filing. Do you agree with that?

A No, I do not.

Q Did you ever have occasion when you were a judge to order debtors to update their income periodically or from time to time?

A That's a -- it would be -- yes. The answer is yes.

Q And in what circumstances would you enter an order requiring the debtor to provide some sort of update on Schedule I?

A Most frequently, after -- or as part of a confirmation dispute. And to give an example, it might be, for example, a salesman on commission or somebody whose income was, for whatever reason, not predictable or expected, by at least some people, to be increasing in the future. And there would be an objection to confirmation on the grounds that the debtor wasn't using all disposable income. That may

or may not be accurate.

But the possibility of a significant change in income in the future might be a reason to require the debtor to report, not necessarily on Schedule I, but one way or another report changes in income periodically, every year, every six months, whatever made sense, as a resolution of a confirmation issue.

Q And if the debtor were already obligated to provide updates, would it be necessary for you to enter an order to require that?

A No.

Q Let's go on to the issue of post petition debt. And if we could pull up Exhibit 1100(p) and zoom in on the fourth paragraph. This is the confirmation order.

Paragraph 4 has two sentences in it, and I want to ask you about the two sentences separately. The first sentence, if I can paraphrase, says don't incur additional debt except with approval of the trustee.

Is there authority in the Bankruptcy Code for an order such as that?

A No, there is not. Absolutely not.

Q And let me ask you about the second

sentence, which says, and I'm paraphrasing here, if you fail to obtain approval, the creditor's claim may be unallowable and nondischargeable.

Is there authority in the Bankruptcy Code for that sort of statement?

A There is. Prior witness mentioned Section 1305, and that's the authority. Section 1305 provides that if a debtor does not get, for certain kinds of debt, that debtor doesn't get written approval of the trustee, then that debt may not be allowed and may not be covered by the plan.

So that second sentence is a fair -- you know, a fair summary of that provision.

Q The Bankruptcy Code clearly contemplates that a debtor may incur debt without the trustee's permission?

A I think there's no other way to read 1305.

Q And let's make sure we understand the concept. If we say that a debt is not going to be allowed and not going to be discharged, what does that mean as between the debtor and creditor?

A It means the debt is fully enforceable by the creditor and fully payable by the debtor. It hasn't been fully discharged -- in fact, the discharge means it's fully enforceable. The

allowance part, that -- excuse me. That has to do with the treatment of the debt in the Chapter 13 case.

So what that's saying, is this debt is not going to be a part of the Chapter 13 case, meaning it's not going to be paid, whatever the -- whatever the plan says should be paid on such debt. That's the -- that's the significance of the word "allowed." Or "allowable."

Q Okay. Now, the record in this case also shows that the trustee, Mr. Beaulieu, mailed to Judge Porteous and his wife a pamphlet. If we can pull that up, I think it's House Exhibit 148. And let's zoom in on paragraph 6, I believe it is, which, again paraphrasing, essentially says can't borrow money or buy anything on credit without permission from the court.

What's the significance of this pamphlet in the context of this case?

A Well, the trustee is not a judicial officer, so the pamphlet, you know, or anything by the trustee has no legal effect. I mean, it's just the trustee's view of what the -- I assume it's the trustee's view of what the debtor should or shouldn't do and maybe the trustee's view of the

law, but it has no legal effect.

Q And let's go back, switching gears again, back to the confirmation order and in particular the language that says the debtors shall not incur additional debt. In your view is it practical or even possible for a debtor to comply with that language if read literally?

A If that first sentence is read literally and independently of the second, no, no, it's not. In the modern world, particularly for urban debtors, it's not possible.

Q What sort of things might a debtor do in the ordinary course of life that would technically be inconsistent with the first sentence of this confirmation order?

A Use utilities, you know, borrow -- borrow money from a friend, I suppose, for -- you know, to get -- to pay a bus fare or something.

The witness -- the professor mentioned you go into a restaurant and order food and you've incurred a debt. So any number of things.

Q Let me ask you to assume you're back on the bench and you enter an order like the one in this case, this confirmation order. And the trustee files some sort of motion and says I've determined

that the debtor incurred a debt without any written approval, please take action, Judge.

What would you do?

A Kick myself for having entered the order, and the first thing I'd want to do, I suppose, is vacate it, at least that first sentence. Assuming I couldn't do that, I would -- I would attempt to construe the order in a way that was consistent with the Bankruptcy Code.

That order -- the first sentence of that order is absolutely unauthorized by the Bankruptcy Code and was judicial error to have entered. So -- and there's good authority for the proposition that if it can be fairly done, an order should be construed so that it is a lawful order, that it is consistent with the authority of the judicial officer who entered it, authority and jurisdiction. So I would try to do that.

I would try to construe the order so that it became a lawful order.

Q What sort of construction would you place upon this particular order so that it would be lawful, in your view?

A Well, this order refers to only one consequence of the incurring of debt, which, as I

said, is, in fact, consistent with the Bankruptcy Code.

So I would construe this order to say that, in essence, unless the debtor obtains written approval of additional debt from the trustee, then that debt should not be allowed or discharged, words -- hopefully better words than those, but that's the idea.

In other words, I'd tie sentence one to sentence two and qualify sentence one so that its application is limited to the situation described in -- or the consequence described in section two.

If that were done, it would be a pretty good application of Section 1305 of the Bankruptcy Code. And I think it -- I think it can be fairly read that way. And as I say, there's plenty of law that says if an order can be read to -- fairly read to be consistent with the statutory authority, then it should be.

Q And if you held a hearing to determine whether the debtor, in fact, violated this order in the first place, what sort of evidence would you be looking to hear?

A Well, as in any other -- assume -- past the issue I just talked about, if I decided that I

needed to somehow enforce this order according to its term -- its more explicit terms, at least the first sentence, as in any other, you know, allegation of contempt, I'd want to know the circumstances. I'd want to know, you know, what the violation was, how serious and how material it was. And I'd want to know the intent and reasons for the alleged violation before I'd do anything.

Q Would you want to hear arguments from counsel about the issue that you just discussed, was this debt in the first place, how would this order be construed, those sorts of things?

A Probably, unless the parties agreed to the facts. I'd probably want to hear more than arguments of counsel. I'd want to hear evidence and arguments of counsel.

Q In your view, if a debtor violated a confirmation order written like this, would it be appropriate to dismiss the Chapter 13 case?

A This is now a post -- this is a confirmation order, so the situation is post confirmation. And I would be very reluctant, assuming, again, I were for whatever reason required to enforce that first sentence, I'd be very reluctant to dismiss this case.

That would be -- that would not be helpful. If the debtor, notwithstanding the additional debt, were -- was making the plan payments, complying with his obligation -- his or her obligations under the plan, dismissing the case and therefore putting an end to those payments would not help anybody, in my view.

Q Let's go back to the concept of the drop dead order we talked about a few minutes ago. As you said, an order of that sort provides that if the debtor fails to cure a problem within a particular period of time, the relief from the automatic stay would be granted. Is that a fair summary?

A That's correct, in that context, yes.

Q Did you ever have situations where debtors failed to cure the problem and therefore did not do what was provided in the drop dead order?

A Oh, yeah.

Q What action did you take when that occurred?

A Well, if the drop dead order was enforced according to its terms, a case just got dismissed. And I would see that it got dismissed or my staff would see that it got -- I'm sorry, the stay would be modified. As I said, I was reluctant to do that

in a dismissal context, but the stay would get modified.

If, for example, the creditor felt uncomfortable relying on the drop dead order and came to court look for what we used to call a comfort order, I would grant it. You know, if the conditions of the drop dead order had been -- had not been satisfied.

Q Would you -- would you pursue other remedies such as contempt of court for the debtor's failure to cure?

A No. No, no, no.

Q Judge Barliant, the Title XVIII, Section 3057 requires a judge to make a referral of a matter to the United States Attorney if the judge has reasonable grounds for believing that the criminal laws relating to bankruptcy have been violated. Is that right?

A That's correct.

Q And those underlying criminal laws that are referred to there generally require that the party at issue have acted knowingly and fraudulently; correct?

A That's correct.

Q In your 14-plus years on the bench, did

you make referrals to the United States Attorney under this provision?

A We actually -- I and, I think, the other judges in my court did, I did, make referrals to the U.S. trustee, who is a -- the U.S. trustee's office is an agency of the Justice Department. And the entity with direct administrative authority over the bankruptcy system.

So I would have made the referral to the U.S. trustee, with the expectation that the -- assuming the U.S. trustee agreed, it would go to the U.S. Attorney.

Q And about how often in your 14 years did you make a referral to the U.S. trustee?

A Very rarely. I'd have a hard time even thinking about a specific case. But I'm sure -- I'm certain less than -- less than five times.

Q Can you recall ever referring a matter to the U.S. trustee for potential prosecution of a debtor?

A I think actually I do. I think I did. Chapter 11 debtor who did -- did a series of things. As I vaguely recall, yes. But not a Chapter -- I do not recall doing that in a Chapter 13 case.

Q Can you imagine making a criminal referral

for potential prosecution for disclosure issues or for incurring post petition debt on a paper record without hearing evidence?

A No. I'm sorry if I'm repeating myself, but I certainly would not do that for incurring post petition debt under any circumstances.

But with respect to the disclosure issues, clearly I would have a hearing before I did anything.

Q And at a hearing, what sort of evidence would you be looking to hear about?

A Well, again, the circumstances, why did -- what is it that happened, why did it happen, what was the intent behind it, if we can determine that, what are the consequences, what's the materiality of the disclosure, you know, what efforts were made to repair the problem, that sort of thing.

Q Would you want to hear whether there might be an innocent explanation for a particular nondisclosure?

A Certainly.

Q Would you want to hear about potential miscommunication between debtor and counsel?

A Right. Obviously, the issue of who -- who made the decision, who actually is responsible for

this, would be -- would be critical as between counsel and the debtor.

Q And let me ask you about a more specific hypothetical. Let's assume that a debtor filed a bankruptcy petition using a pseudonym rather than the debtor's actual name, and let's further assume that the record showed that it was the debtor's attorney's idea and the attorney advised the debtor that no harm would come of it, and further assume that both the debtor and counsel intended that the incorrect name would be fixed before notices went to creditors and, in fact, that was done before notices went to creditors.

Given those facts, would you make a referral to the U.S. trustee or the U.S. Attorney?

A No.

Q Why not?

A Well, the fact that the problem was corrected before there could potentially be harm to creditors or any defrauding of creditors or any injury would indicate to me, and the fact that it was on advice of counsel, those facts would indicate to me that there wasn't an intent to do this in a fraudulent way.

Whatever the reason was, it wasn't to

defraud creditors. And also, it didn't have the effect of defrauding creditors because creditors got the correct notice before time to file claims or before anything -- anything had occurred.

MR. WALSH: Just one moment, Madam Chair.

Thank you. Nothing further at this time.

CHAIRMAN MC CASKILL: Is there cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Mr. Barliant.

A Good morning.

Q Alan Baron, here as special impeachment counsel for the House of Representatives in this matter.

Would you agree with the Supreme Court in Local --

A Local Loan versus Hunt.

Q Famous case.

A Very famous case.

Q Where the court said that the protection of the bankruptcy law is for the honest, but unfortunate, debtor?

A I --

Q Would you agree with that?

A Like almost everybody, I agree with it as a -- as a sort of a general statement of goal. So to that extent, I agree with it. But of course it has to be given content, which the -- which Congress has done.

Q As a working principle, though, you would accept it?

A Working principle? I'm not sure it rises to that level. It's dicta in that case, and it's -- it's a statement of an aspiration, I would say. I don't know that it's a working principle, because I don't know how to apply that.

Q Okay.

A Other than -- other than by doing what Congress has said we should do.

Q Would you agree that candor by the debtor is essential to the operation of the bankruptcy system?

A I would.

Q And would you agree that the bankruptcy statute requires that a proposed plan in a bankruptcy be presented in good faith?

A Yes.

Q Okay. And you understand that this proceeding is an impeachment trial and not a

question of whether a proper or improper discharge in bankruptcy was afforded to Judge Porteous?

A I do understand that.

Q With those earlier principles in mind, I want to go through some facts that I submit to you are established by the evidence. First, Judge Porteous filed his initial bankruptcy petition on March 28, 2001. Do you recall that?

A Yes, I do.

Q And the day before, March 27, he paid off three markers in cash to the Treasure Chest Casino totaling $1500. Now, this transaction does not appear anywhere on his schedules which he filed under penalty of perjury. Okay?

Second, Judge Porteous filed his petition on March 28 in the name of G.T. Ortous, and it was suggested by his bankruptcy lawyer. Judge Porteous agreed to it and signed the original petition under penalty of perjury.

Are you familiar with those facts?

A I am.

Q I want to come back to the issue of advice of counsel, but let's continue.

Judge Porteous also obtained a post office box, which he used as his residence address on the

March 28 petition. And this, too, was at the suggestion of his bankruptcy lawyer. Judge Porteous agreed to it, went out and got the P.O. Box. And his real home address on that initial petition is not found. And this too was signed under penalty of perjury.

You're familiar with that?

A Correct.

Q Okay. On March 23, 2001, that's five days before that initial petition, Judge Porteous filed his year 2000 income tax return and claimed a tax refund of approximately $4100. That does not appear on the schedules he filed in his bankruptcy, and he never told his lawyer about it.

Are you familiar with that?

A I've seen that, yes.

Q Okay. And a few days after he filed his amended petition on April 9, four days later, on April 13, he received that tax refund, but he didn't tell his lawyer, and the money went directly -- it was direct deposited into his bank account.

Also, in conjunction with his amended petition, the pay stub that was submitted was from the year 2000, and the pay stub at the time of filing in 2001 would have shown an additional $174 a

month, but that current pay stub was not submitted in conjunction with the filing.

Now, given all that, do you believe that those facts, if established, are consistent with the candor required of a debtor?

A Clearly, some -- there -- on those facts, there were errors, and some of which may have been intentional errors, in the filings. So it -- it's not -- the filings were not completely candid.

Whether it's consistent with what's required under the Bankruptcy Code is a different inquiry. So I'm not sure I know what you're asking exactly.

Q Well, under the Bankruptcy Code am I correct that it's basically the issue seems to be from all we've heard is good or bad for the creditors. Regardless of how we get there, whether he lied or didn't lie, is it good or bad for the creditors seems to be the overriding concern. Is that a fair statement?

A It's a reasonable statement. There is a systemic stake here. But it is also true that the Bankruptcy Code has a purpose, and the main function of the court, at least, is to carry out Congress's purpose in adopting the code. And that generally is

for the protection and benefit of creditors and debtors.

Q Right. And how you get there seems to be a lot less important than getting there?

A I guess as sort of like the local -- Local Loan versus Hunt statement, I guess as a general proposition, I'd agree with that.

Q Now, I want to go back to the advice of counsel issue. Do you find the fact that Judge Porteous received advice from his bankruptcy counsel about this false name, and let's not bandy it about, it is a false name, it wasn't by mistake, not a typographical error?

A That was my understanding, yes.

Q Do you find that exonerates him from filing that way under penalty of perjury?

A Under penalty of perjury?

Q Yes.

A I don't think that it -- it's not -- it doesn't -- that in itself would not exonerate, to use your word, exonerate Judge Porteous, if that were the only fact.

Q Well --

A I mean, I think what I said was in my direct examination, was that I would be looking,

before I did anything with respect to that, to the judge's -- Judge Porteous's intent and the materiality of the act, in this case filing under a false name.

So it's not so much a question of exonerating; it's a question of what the -- what the consequence should be.

And as I said, given the fact that he was relying on his attorney and, in addition, very important to me, the fact that they almost immediately corrected the document so that nobody -- essentially nobody -- none of the creditors would even know that there had been a false name given, those two facts combined, I cannot -- I could not -- I do not believe I could find that there was any intent to commit fraud or otherwise harm the creditors or otherwise even impair the system, which is much different than saying I condone what he did.

Q I want to ask you about a case that you decided involving advice of counsel. It's in very small print, so you have to bear with me. It's in re: Patricia K-a-d-e-m-o-g-l-o-u.

Do you recall that case?

A Vaguely.

Q Now, in that case, the woman was not a

lawyer, she certainly was not a judge, she failed to show up for some hearings. And her excuse was, and you accepted that for purposes of your decision, that she had been advised by her counsel that she didn't have to show up. And nevertheless, you said that she could not rely on advice of counsel and held her in contempt.

Do you recall that?

A If I -- yes. But if I recall the case correctly, there was -- there was some very material consequences to what she had done.

Q Well --

A Again, in this instance, if all there was -- and I think I answer this in your first question. If all there was was advice of counsel, that would be a different case than this case.

I vaguely remember that case, and I -- but I can't give you the details any longer.

Q Okay. Now, you took issue with the order that was entered in this case, the confirmation order; isn't that correct?

A That's right. I definitely did.

Q I'm sorry?

A I definitely did, yes.

Q And if I understood you, in particular, I

believe it's paragraph 4, which says the debtor shall not incur any additional debt without the written authority or permission of the trustee?

A Right.

Q Right. Now, you've heard from Mr. Hildebrand, he uses a version of that, it contains that language, and it's pretty widely in use?

A I did hear that testimony, yes, I did.

Q And do you disagree with that fact?

A Do I disagree with the fact? No, I have no basis for disagreeing with the fact.

Q Okay. Now, let's assume for the moment that the debtor finds the provisions of the order or a provision of the order to be onerous, for whatever reason, or disagrees with it, thinks it's unlawful. Are you -- are you saying it's okay to ignore the order?

A No, I'm not. I am not.

Q What are the remedies if a debtor believes the order is improper, onerous, for whatever reason? What remedy does he have, short of ignoring it?

A Opposing the entry of the order in the first place, moving to vacate the order later, which could be problematic, depending on timing issues.

Those would be the remedies, the ones that come to mind.

Q Now, the evidence establishes that Judge Porteous got credit at various casinos and during the year following the judge's order by sign -- and he signed various markers in conjunction with them.

Are you familiar with markers?

A I am not familiar with markers. I've listened to some of the testimony, and there seems to be a disagreement about whether that was getting credit or not getting credit. And I do want know.

Q You have no opinion on that?

A I have no opinion on that.

Q Assume for the sake of argument -- and I'm not asking you to assume it beyond that -- that in fact it is credit that's been testified to by a number of people that it is -- by the Fifth Circuit majority, by Judge Duncan Keir, so you may know, colleague of yours.

A Right.

Q Mr. Beaulieu, Mr. Hildebrand, they all conclude that it's debt.

Would that violate the court order?

A Again, if you -- as I would construe that court order, the answer is no. If you look at the

first sentence of that paragraph 4 and apply it literally, the answer is yes.

Q The evidence also shows that Judge Porteous obtained and used a credit card after the order was entered without getting permission from the trustee. Would you regard that as a violation of the court order?

A Same answer. If I were construing that answer -- that order so that it was consistent with the authority vested in the judge by the Bankruptcy Code, the answer would be no.

If we look at that first sentence and apply it literally, without regard to the second sentence, the answer would be yes.

MR. BARON: One moment, please.

BY MR. BARON:

Q What do you think would be the impact on the bankruptcy system if all debtors who may want to avoid the embarrassment of seeing their name in the paper as having filed for bankruptcy, if they all decided they're going to file in phony names? What would be the impact on the system?

A I suppose it would be a problem for the clerk's office. Let me back up a step.

Are we also assuming that the phony name

was corrected immediately or not?

Q Try it either way, either way you'd like.

A Well, the first way, if the petition is filed and there's not a correction, the effect would be very bad. It would impose an even greater burden on Chapter 13 trustees than they already have, which is pretty considerable, to uncover that sort of thing, which by the way, as Mr. Hildebrand testified, has been significantly addressed by Congress already and by procedures that are in place.

But the answer is if the -- if the problem is not corrected, it would have an adverse impact on the system.

Q Right. Because it might mislead creditors and --

A Exactly, mislead creditors.

Q And you'd never know who was filing for bankruptcy?

A It would mislead creditors. It would essentially render the first meeting of creditors, you know, not meaningless, but there would have to be a follow-up meeting because you wouldn't have given the proper notice to the creditors.

It would -- it would create serious

problems.

Q Isn't there a systemic interest in making it clear that intentionally false filing, let's say of the name, will not be condoned, whether the debtor believes it will affect the creditors or not or indeed whether it actually affects the creditors or not? Isn't there a systemic interest in not allowing this to happen?

A If I said I was going -- I would condone that, I apologize, because that would have been a misstatement.

What I said was, I think, that I could not find any fraudulent or other kind of malicious or wrongful intent in doing this.

Clearly, it was wrong for Judge Porteous to have used a false name, and it was wrong for the attorney to advise him of that.

If this came before me and I got this evidence, at a -- I am quite certain I would have sanctioned the attorney. I would have reduced his fee or I would have done something to make it very clear -- I very likely would have written an opinion to get it out there in the world of Chapter 13 lawyers that this was not -- could not be condoned, to use your word.

With respect to the debtor, a debtor of the sophistication of Judge Porteous, you know, I may have imposed some sort of a sanction or I may have just criticized him or something to that effect.

More typical Chapter 13 debtors who have no sophistication I would not have done anything to.

But I would not have condoned this conduct.

Q But of course you weren't sitting as a court of impeachment, were you?

A I was not and I am not.

Q Would you report such activity to the bar association?

A Probably not, if it were explained to me the way I've taken it from the portions of the record that I've read, that this was an attorney who was, you know, however misguided, was trying to do his best for a client who had public prominence. And also if I were to determine that it's not something he did repeatedly.

There are -- a prior witness talked about situations, and this happens, where debtors use misleading names, whether they're phony or not, they're misleading names, for purposes that affect

the creditors and the bankruptcy process.

This doesn't appear to be one of those situations. So if that was my finding, I probably would not refer this to the bar association. I would make it clear to that lawyer, both through sanctions and probably through a published opinion, that it was not -- that he shouldn't do it again and neither should anybody else who practiced in our court.

Q Are you aware that Mr. Beaulieu testified that Mr. Lightfoot called him up to say there was a typographical error in the name, as opposed to what we know are the real facts, that they consciously decided to file in a false name?

A No, I don't recall either hearing or reading that testimony, so no, I'm not aware of that.

MR. BARON: Thank you. Nothing further.

CHAIRMAN MC CASKILL: Anything further?

MR. WALSH: We will waive redirect, Madam Chair.

CHAIRMAN MC CASKILL: Any questions from the panel?

You may be excused.

THE WITNESS: Thank you.

(Witness excused.)

CHAIRMAN MC CASKILL: Let me check with counsel now. We have completed four witnesses and I count that we have three left. Is that correct?

MR. TURLEY: I believe that is correct, Madam Chair.

CHAIRMAN MC CASKILL: Okay. If -- it's my understanding that our vote now is at 2:30. It's also my understanding that the Foreign Relations Committee has something to vote on as soon as that vote is over.

Are you all doing more work on it, or are you just reconvening to vote?

Do you know, Senator Wicker?

SENATOR WICKER: Well, Madam Chair, there -- there isn't a real contentious issue before Foreign Relations, but because of the sheer number of the items, it may take 20 to 30 minutes, even to do a perfunctory --

CHAIRMAN MC CASKILL: I can't sweet talk you into proxies? No?

SENATOR RISCH: Madam Chairman, on some of them. But there are a couple we're going to want to express ourselves on. Briefly, but succinctly.

CHAIRMAN MC CASKILL: Okay. Well, it

would be my intention to try to go ahead and take the next witness and go only until 12:30 and then adjourn at 12:30 and come back at 3:15.

Will that accommodate the members of the Foreign Relations Committee appropriately?

SENATOR RISCH: The latter part I have no problem with. I have to leave a little earlier than 12:30, but I'm hoping we can get somebody else in here.

CHAIRMAN MC CASKILL: As soon as you have to leave, you should leave, Senator Risch. When you do, if we don't have anybody else here, we'll adjourn at that time.

SENATOR RISCH: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Call your next witness.

MR. TURLEY: Thank you, Madam Chair. The Defense would like to call Mr. Rees.

Whereupon,

ROBERT B. REES

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Rees, my name is Jonathan Turley. I'm one of the counsel representing Judge Porteous. Good afternoon.

A Good afternoon.

Q Can you start by simply giving your full name for the record.

A Robert Byrne Rees.

Q What is your occupation, sir?

A I'm an attorney.

Q And where do you practice principally?

A Southeast Louisiana.

Q And prior to becoming an attorney, what was your occupation?

A Before law school, I was a policeman, Lafayette city policeman, Louisiana state police.

Q And give us an idea of what percentage of your career have you practiced in Louisiana?

A Pretty much all of it. I think I got sworn in in '85.

Q Would you estimate 100 percent, then?

A Yeah.

Q You might want to pull the mic a little closer so the Senators can hear you a little better. It's a rather big room.

Before you became a private counsel, did

you serve as an assistant district attorney?

A I did, in the 19th JDC, and then went back into private practice and then I spent two years in the 22nd JDC.

Q And specifically in 1994, what were the areas of your practice?

A Criminal defense.

Q You were in the House report on page 75, and this is House Exhibit 444, I am quoting, it says, "on September 20, 1994, Robert Rees, an attorney who did occasional criminal work," and then goes on.

Is it correct to say that you did occasional criminal work?

A No, I did 100 percent criminal defense work. When I was not a prosecutor, I was a criminal defense lawyer.

Q So that statement is not true, you did all criminal work; is that correct?

A Uh-huh.

Q Okay. And did you do mostly state or federal practice?

A All state.

Q Now, what years did you practice specifically in the 24th Judicial District?

A From 1991 until 1997. And then in '97 I still did some work in Jefferson, but I moved about 30 miles away to north of Lake Pontchartrain, which is the 22nd JDC.

Q Just give us an idea of your practice. How busy was your practice in 1994?

A I was real busy. I had a full plate.

Q So, for example, how many matters would you handle in a given day?

A At that point in time, I was either in the first or second parish courts of Jefferson Parish, maybe Orleans municipal or traffic, for the 24th JDC. And seven to 15 maybe.

Q In one day?

A In one day.

Q Now, in the early 1990s, did you have occasion to meet Louis and Lori Marcotte?

A I did.

Q And just generally, what was your understanding of the percentage of bonds that the Marcottes were handling in Gretna?

A Well, when I first met them in 1991, it didn't really mean anything to me, but after being in -- in the Gretna area for a while, they pretty much had it monopolized.

Q So you say 90, 95 percent?

A I would say so.

Q Now, did you come to handle bond issues with the Marcottes?

A I did some, yes.

Q And did you know a man by the name of Mike Reynolds?

A I did. Went to law school with Mike Reynolds.

Q You were law school friends?

A Yes.

Q And did you have occasion in early or mid-1990s to sometimes come before Judge Porteous?

A I did.

Q Now, did you know a man by the name of Audrey Wallace?

A I did.

Q When do you think you first met Audrey Wallace?

A Sometime in the early 1994s, he was an employee of Bail Bonds Unlimited.

Q So in relation to your work with the Marcottes, you met Mr. Wallace?

A Correct.

Q And in 1994, did Mr. Wallace ask you to

assist him in having a previous sentence amended?

A He did.

Q And for his sentence to be set aside, I mean his conviction to be set aside?

A Correct. He asked -- well, when -- to amend it to get the Article 893, then the second step of that would be to invoke the Article 893, which would be a set-aside.

Q In fact, didn't he ask you several times about that matter?

A He did.

Q And is it true that Louis Marcotte also asked if you would assist Mr. Wallace?

A I believe Louis Marcotte asked me first, and then Mr. Wallace then asked me several times after that, until I got the motion filed.

Q Now, did you view it in any way strange or wrong that Mr. Marcotte would ask you to help one of his employees in such a manner?

A Well, he needed to clean up Mr. Wallace's record to be able to license him as a bail bond agent, and I believe that's why I was asked to do it.

Q So in September 1994, did you have *occasion to file a motion to amend of Mr. Wallace's*

sentence for burglary?

A I did.

Q And at the time you filed that, did you feel that the case law supported your motion?

A I did.

Q I'm going to show you a demonstrative to help us get through this rather complicated history. I don't know what your eyes are like, but you might have a better shot --

A My distance vision is good. The reading is what's bad.

Q Now, Mr. Rees, we've divided this demonstrative into two parts, and you'll see at the very top, the lighter portion deals with Mr. Wallace's drug charges, and the bottom portion deals with the burglary charge. Do you see how that's divided?

A I do.

Q Okay. Now, if you take a look over on the left side of the top, you'll see it says on December 15, 2008, Wallace was arrested on this drug charge.

Do you see that?

A Correct.

Q Okay. And technically, that was the first arrest shown on this demonstrative; correct?

A It is.

Q Okay. Now, if you look at the top, the next event that is shown is that February 26, 1991, it shows that he pleads guilty to the drug charges.

Do you see that?

A I do.

Q Is that your recollection of what occurred in the drug charges?

A I was not involved with the drug charges of Mr. Wallace.

Q So then let's go to the portion that you were involved with. If you look down at the burglary section, the darker section, it says "5/8/89 Wallace arrested on burglary charges."

Do you see that?

A I do.

Q It goes through an arraignment. It goes through some rescheduling. And then it shows on 6/26/1990, it says, "Wallace pleads guilty, Judge Porteous issues sentence, three years hard labor, suspension and two years probation."

Do you see that?

A I do.

Q Now, the next event I want to point you to is, if you go to the top, after that sentencing,

that is when Mr. Wallace pleads guilty, is it not?

A I saw -- I see that, yeah.

Q Okay. Now, finally I want to bring you back, on December 11, 1991, it says, "Wallace probation terminated because, as a result of his imprisonment, he cannot complete probation."

Do you see that?

A I do.

Q Now, is that an accurate representation of what you believe occurred on -- in terms of --

A From looking at all the records, I believe so.

Q Okay. Now, I just want to point out that the next event is 9/20/94, it says "Robbie Rees files motion to amend sentence."

Do you see that?

A I do.

Q Is that accurate as well?

A I believe so, yes.

Q I'm going to ask you to help us through this, because it gets a little bit complex between these provisions.

We're going to pull up House Exhibit 82, and although it's not Bates labeled, this is page 102 on the .pdf.

Do you recognize this motion?

A I do.

Q Is that the motion you were referring to earlier?

A Yes, that's the motion I filed.

Q Okay. How can you tell that you filed this motion?

A That's my signature.

Q Did you draft this motion?

A I believe I dictated it. I didn't type it myself, but I believe I told someone to type it. I don't remember who, but --

Q But you filed this motion on behalf of Mr. Wallace?

A I did file the motion.

Q And you inserted your name and address on it; correct?

A On one of the copies I did. That would have been the original that probably should have stayed with the clerk's office. The second copy when I file a motion, there's a courtesy copy that goes to the district attorney's office.

Q You filed two at the same time?

A I filed two of the same motion, but on the original that would go to the clerks and to the

judge, I would put my address and identifying information.

Q That's pretty standard to file two things like that?

A Yeah, but I probably also clock one for myself to keep it in my file.

Q Can you tell me what the date is shown as to when you filed it?

A September 20 of -- September 20 of '94.

Q Okay. Now, you mentioned that there was another copy that has appeared. I believe this is also part of Exhibit 82. And it's page 103 of the .pdf. I'd like to bring that up.

Is this the redundant motion that you were referring to earlier?

A It's a duplicate copy of the same motion.

Q And they were filed the same day?

A Same time. If you see the clock stamp from the clerk's office, it shows the exact same time and date.

Q Okay. So when you filed these -- particularly the second motion, it was to make the district attorney aware of the motion, is it not?

A Right. It was routine for the clerk's office, there was a basket, you put it in there, it

goes to the DA's office for that division to be notified that the motion has been filed and it's being asked to be set.

Q Now, this isn't a very long motion, is it?

A No.

Q Let's take a look at the top right-hand corner. Does that state what division it was filed in?

A Yes, that's division A.

Q Division A. Now, under number 1, I just want to look at a statement that says, "the defendant was sentenced on June 26, 1990 to three years in which said sentence was suspended and two years active probation."

Do you see that?

A I do.

Q Do you know what crime he had been sentenced for?

A Yes. I checked the record beforehand. It was for a burglary charge.

Q Who was the judge that sentenced him on that?

A Judge Porteous. It was in Judge Porteous's division.

Q So this was going back to the division and

the judge that handled the original offense?

A That's the way it's supposed to work.

Q Okay. Mr. Rees, I'd like to direct your attention back to the motion to amend. From this motion to amend, can you tell if Judge Porteous set it for a show-cause hearing?

A Go back --

Q This is back to the previous copy.

A Would you go back to the previous motion that does not have the identifying --

Q Yes. They're bringing it up now.

A Yes. I did not ask for a contradictory hearing on this, but Judge Porteous, in his own handwriting, scheduled it for a contradictory hearing or a rule to show cause, which would be a contradictory hearing.

Q So you didn't ask for it, but the judge went ahead and scheduled it for a contradictory hearing?

A That's correct.

Q What's the purpose of a contradictory hearing?

A To give the district attorney's office an opportunity to object to it.

Q Now, is it your understanding that

Mr. Wallace was essentially sentenced to two years' probation because his imprisonment had been suspended?

A That's correct.

Q So even if he had completed his full sentence of probation, it would have ended in 1992, would it not?

A Yes.

Q And that would be well before the date of your actual filing in this case?

A That's correct.

Q Let's look at the middle of the page, at number 2. And I want to direct your attention to a statement that says, "defendant desires to amend his sentence to give him benefit under Article 893."

Do you see that?

A I do.

Q What does that mean, benefit of 893?

A Okay. He was given the benefit of probation -- suspended sentence and probation. But Article 893 of the Code of Criminal Procedure provides that upon satisfactory completion of your probation period, it serves as an acquittal and the conviction can then be set aside, which would then allow you to use the expungement statute to remove

the request from your record.

Q Is that a common request?

A Yes.

Q Is that your signature at the bottom of the page?

A Yes, I filed that motion. That's my signature.

Q Now, in the course of your practice, do you have on occasion -- on occasion do you file motions to amend?

A I have one pending right now.

Q Can you give us that as an example, what's pending?

A Yeah, it's a -- a judge would -- when entering a plea agreement, a lot of judges routinely will say I'm going to give you a suspended sentence, I'm not going to give you the benefit of either 893 on a felony or 894 on a misdemeanor until after you satisfactorily complete the probation.

At that point in time, I will give you the right to reappear before me and ask for the invocation or amendment to include that to be able to invoke it to then get the benefits of the expungement.

Q I see.

A But they hold the probation, I guess, over their heads just to allow them to complete the probation, and then if they do satisfactorily complete it, they then agree to amend it to include that either 894 or 893.

Q So after you filed your motion to amend the sentence, did the court go forward and hold the hearing on the motion?

A They did. Actually, the next day.

Q Okay. I'm going to put the transcript up for that hearing, which I believe is House Exhibit 246. On the first page, is there a date?

A Yes, September 21, 1994.

Q Okay. I'm going to turn to the fourth page of this transcript. It indicates that Mr. Netterville stood in for you at the hearing. Is that your recollection?

A Yes. In reviewing those documents, that's -- that's what happened.

Q And does that often occur, where you'll have a colleague stand in on a hearing like this?

A Yeah, if you know that you're not going to be able to make it, you try to arrange -- if it is a set hearing, then you try to arrange to have someone cover it.

Q I'm going to direct attention to the top of that page.

I'm sorry, if you can bear with us for one second.

Do you see near the top of the page a line that says, "I've already spoken with the DA on this"?

A I do. I do.

Q This is what Judge Porteous is saying in the hearing; correct?

A Correct.

Q And so he tells you that -- and everyone else in the courtroom, "I've already spoken with the DA on this"?

A Right. This is an on-the-record statement.

Q And by "this" he's referring to the pending motion?

A Correct.

Q Was Mr. Reynolds in the room, to your knowledge, in reviewing this transcript?

A By looking at the first page, when it says the people that were present, it was Mr. Reynolds and Mr. Netterville, so I would assume that Mr. Reynolds was there.

Q Now, by the way, I want to step back for a second to ask you a question. Because we have these two provisions, 893 and 881.

A Correct.

Q Is it true that under Section 881 at the time, the judge was not even required to solicit the position of the district attorney on these matters?

A Correct. As I -- in reading the 1994 version of 881, there was no requirement for a contradictory hearing.

Q But Judge Porteous went ahead and said I want to have a contradictory hearing?

A Judge Porteous said that on his own motion.

Q Now, are you aware that later, when we're talking about these provisions and the discretion of the judge, that later there was an amendment of this law?

A I believe it was 1997 they amended it to include several other requirements for 881.

Q And was it your understanding that that amendment made it clear that the judge has discretion in this area?

A Yes, there's -- I think paragraph A says that after execution of sentence, it can't be

addressed. But then paragraph B says if it's a felony without hard labor or misdemeanor, he can address it again on his own volition. And then it goes on to say that if he wants to address it, it has to be set for contradictory hearing.

MR. TURLEY: I'm sorry, Madam Chair?

CHAIRMAN MC CASKILL: Yes, we are going to have to adjourn now. I apologize to the witness for interrupting him midstream. But we will adjourn. And we will reconvene at 3:15, when we will finish the direct of Mr. Rees, handle the cross, any redirect that is necessary, then go on to witnesses Tiemann and Mackenzie. And if everyone is helpful and is here, then we should be able to finish the evidence today.

So don't start setting meetings tomorrow, though, until we're sure we get finished. I don't want everyone to start scheduling things that would cause us not to be here tomorrow if we need to be here, we will certainly do so.

MR. TURLEY: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: We will adjourn until 3:15 this afternoon.

(Whereupon, at 12:31 p.m., the proceedings were recessed, to be reconvened at 3:15 p.m. this

same day.)

AFTERNOON SESSION (3:30 p.m.)

Whereupon,

ROBERT B. REES

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN MC CASKILL: We will come back into session, and the witness can once again take the stand. I believe, Mr. Turley, you were still in direct when we adjourned.

MR. TURLEY: That is correct, Madam Chair. Thank you.

DIRECT EXAMINATION (Continued)

BY MR. TURLEY:

Q Mr. Rees, you're already under oath, I believe. Thank you, Mr. Rees. I'm going to start where we left off. In fact, I'm going to step back a question and try to begin where we were last in discussion.

I want to go back to the hearing on September 21st, 1994, and to the transcript that we were looking at. This is a line that I pointed out in the middle of the page of Exhibit 246. This is a statement by the judge. I just want to read it again because that's where we, I believe, left off.

The judge says "subject was sentenced on 2/26/91 on 89-0001, to five years at hard labor for possession of PCP and cocaine. That conviction or that crime technically predates the crime for which he pled in my particular court."

In your experience, is that statement correct?

A Well, yeah --

Q You might have to turn your mic back on. I'm not so sure it's on.

A Correct. The arrest for the drug charge predated the arrest for the burglary charge.

Q Okay.

A And the arrest for the drug charge, I believe, was allotted to a different division than Division "A," but the burglary charge got allotted to Division "A."

Q Let me just ask you generally, instead of walking you through it. You have a lot more experience on this subject than I do. Can you just explain what the problem is that arose?

A Okay. The problem is the defendant has two arrests, so basically two pending charges in the same jurisdiction, basically the same courthouse. The second arrest for the burglary came to court

prior to the drug charge. He entered a plea to it, got put on probation, because at least at that point in time he had no convictions. He had the other arrest but no convictions.

Then after that, he entered a plea to the drug charge and was sentenced on that charge, didn't get probation. And I was uninvolved in that. I don't know why. But the second conviction, which carried the jail time, then caused the probation office to request a termination of the probation based on that conviction. Well, he didn't commit anymore criminal activity. So the probation shouldn't have been terminated, you know. The reason for termination is, first of all, to avoid criminal activity, to see if you stay out of trouble. The fact that he already had the arrest, there was no subsequent criminal activity to him being placed on probation because the first arrest predated the burglary charge that he was on probation for.

Q And so that was the problem, in your view, that the judge was raising in this comment?

A Right, to -- the judge had to go back and undo the unsatisfactory termination of the probation, all right, because it was based on the

prior arrest, which was not grounds to revoke the probation that Judge Porteous had placed him on.

Q And you know, we've heard the expression an "illegal sentence" or an "incorrect sentence."

Is it correct to say that when you believed a sentence had been incorrectly made, that this is the type of thing judges will do in amending a sentence of this type?

A Right. It was incorrect to terminate his probation based on that, the fact that he got jail time as a result of a prior arrest.

Q I see. Now, I know that you commonly invoke 893 at sentencing, but is there a division of opinion among attorneys that you know of as to whether the satisfactory completion of a suspended sentence allows you to get the benefits of 893?

A Again, I try to use the language that he's being sentenced under, either 894 for misdemeanors or 893 for felonies, because that's the article that controls whether a defendant has a suspended sentence and is placed on probation. Those are the two articles, one for misdemeanors, one for felonies. The only way to do that is to use one of those articles. Whether the language that he's being sentenced under that article number or not,

that's the only way to suspend a sentence and place him on probation. Misdemeanor would be 894; felony would be 893. And some lawyers think that just the fact that they're getting a suspended sentence and being placed on probation, that's the article they have to use to do it.

Q So those lawyers don't believe that you have to actually invoke 893? They really look at the satisfactory completion of the suspended sentence?

A Because under Article 893 or 894, the way to be able to use that article to then have the set-aside done is satisfactory termination of the probation or completion of the probation.

Q Okay. Now, in your view, under Louisiana Code of Criminal Procedure 881, was the judge allowed to do what he did here?

A I think because it was an incorrect thing to do on the termination of the probation, that's how he would have to go back to fix it.

Q Now, let me direct your attention to the end of this transcript, to a statement that I'd like to highlight where the judge says "if you want further relief, then file a petition to enforce 893, and then I'll execute that also."

Do you see that statement?

A I do.

Q I want to make sure we understand how this process works, because it seems to be different in Louisiana than many other states. Am I correct that the first step in this process is a motion to amend the sentence; correct?

A In the situation we're dealing with right now, yes.

Q Okay. And then the second step is a petition to enforce 893?

A Showing that the probation was satisfactorily completed. You invoke Article 893, and then the set-aside is done.

Q And that's the third step, is a motion to set aside?

A Well, yeah, and then the fourth step would be a motion to expunge the arrest.

Q If you go forward all the way to the end, the fourth step would be expunge?

A Right.

Q Okay. So when the judge is saying I've now done this, why don't you -- if you file a petition to enforce 893 I will execute that also, what was he telling the parties in the Court?

A That there had to be another hearing to invoke Article 893.

Q Okay. And that he was prepared to grant that as well?

A Correct. Because once the defendant is sentenced under 893 and has a satisfactory completion of probation, the next step would be just to say to come forward and show that, probation ended satisfactorily, he has an 893, we're asking it to be invoked.

Q And once a judge has amended a sentence, is there any doubt that he tends to enforce 893 in most cases?

A I wouldn't think so.

Q And so the second step is primarily sort of an administrative step in most cases?

A Yeah, that's probably true.

Q And as for that final step on expungement, would that also be more administrative or ministerial, that if you get to that point it's treated as largely administrative?

A Back in '94, I would say yes, but now, in the jurisdiction of the 22nd JDC, expungements require a contradictory hearing. So I don't know that that's anywhere in the statute. It's just the

rule that the DA's office is using. They want to make sure that whoever is applying for an expungement is entitled to it.

Q Now, in the hearing that we just went through, it's your understanding that there was an assistant district attorney in that hearing, was there not?

A According to the transcript, yes.

Q And who was that?

A Mike Reynolds.

Q And as far as you know, was there any objection from Mr. Reynolds during the hearing?

A No, not according to the transcript. I wasn't at the hearing, so I don't know, but according to the transcript, no.

Q Now, you mentioned that you went to school with Mr. Reynolds. Did he raise an objection with you before the hearing?

A Not that I remember, no.

Q And did he raise an objection after the hearing to you?

A Not that I -- I don't remember, you know. We had -- the second hearing was a month later. I don't --

Q I'm talking about outside the courtroom.

A I don't think prior to the hearing, I don't believe.

Q Now, as a former ADA yourself, if Mr. Reynolds had an objection, how would he go about making that objection to this type of proceeding?

A Go up his chain of command, go to a supervisor, or even voice it to the judge.

Q I want to direct your attention to that. You had mentioned the hearing that followed, and I would like to go to that hearing, which I believe is on October 14th. Is that the hearing that you were just referring to, October 14th, 1994?

A Correct. That's the hearing that I attended.

Q I would like to put that transcript up on the screen, and I'm specifically going to direct your attention to page 41 of the PDF. This is Bates labeled Porteous 625. Now, in this hearing, you appeared for the defendant, Aubrey Wallace; is that correct?

A That's correct.

Q And who appeared for the state?

A Mike Reynolds.

Q Okay. Let's turn to page 4 of that transcript, the Bates label PORT628. Now, is it

true that during this hearing you specifically asked to put comments on the record?

A Yes, I did.

Q Why did you do that? Why would you want to put comments on the record?

A Because I was going to ask for the invocation of the 893 orally.

Q So this was an oral motion?

A Correct. I was making sure that the -- at the hearing before, that everything I had asked for in the motion to amend the sentence had been done, which the Court did. And then at this motion, I was asking to invoke the 893, and I did that orally.

Q So this is precisely what you had discussed -- not what you had discussed, what the judge had indicated in the first hearing? You were now making that motion --

A This is the second step that we needed to do to complete that procedure.

Q Was there any objection from Mr. Reynolds?

A Not that I remember. It's not in the transcript, but if he had had one, he would have voiced it.

Q I see. And do you recall if there was any concerns that he raised outside the courtroom to

you?

A I don't remember, but I don't believe in between the two hearings I was.

Q And following this, Judge Porteous entered an order setting aside the conviction, did he not?

A Correct. I believe it was signed on the 14th also.

Q And once again, when Judge Porteous entered that order, was there any objection from Mr. Reynolds?

A No. At this hearing -- he signed the order also, but at the hearing on the record, he indicated he was going to invoke it. "Under 893, the dismissal will be entered," is what it says.

Q If an ADA had objections, say, after the hearing, was there something the ADA could do? Let's say after all of this the ADA says I have a lot of problems with this. What are the options of the ADA?

A Go to the appellate section of the DA's office and have something filed to have it brought back or overturned.

Q Can you actually appeal a ruling like this?

A I believe so.

Q Is that by filing a writ of some type?

A I would think so, yes. I don't do appellate work, but they have a special section of the DA's office that does that. If they had that much of a problem with it, that's what they should have done.

Q Do you know of any writ filed on this issue?

A No, sir.

Q How much time do you think you actually worked on this issue as an attorney?

A On this case right here?

Q Yes, sir.

A 30 minutes, if that.

Q Is that fairly standard in these types of cases? You said you handled as many as --

A Well, back then when the constraints weren't as tight as they are now, yes. I would say it was a very simple motion to do. Either they're entitled to it and it's granted, or they're not entitled to it and it's denied. I guess if he had not been entitled to it, the first motion would have been denied, and it would have been over with.

Q Didn't you say once that when it comes to the final stage of expungements, that you actually

just carry around forms of expungement in your briefcase?

A For different jurisdictions, I do. I did then; I don't now.

Q Did Mr. Wallace pay you for this assistance?

A No, he did not.

Q Did Louis or Lori Marcotte pay you?

A No.

Q So you didn't get paid at all for this?

A No.

Q So you had done work for the Marcottes prior, hadn't you?

A Yes. I had done some bond reduction work.

Q Did you view this as just a small administrative task that you did for one of your regular clients or their employees?

A I would say yes.

Q Now, from your personal knowledge, do you know of any conversation between Judge Porteous and Louis Marcotte about this matter?

A Personal knowledge, no.

Q And from that personal knowledge, do you have any knowledge of any conversation between Judge Porteous and Mister -- I should say Reverend

Wallace on this matter?

A No, sir.

Q Now, at some point did the MCC come and interview you about this matter?

A They did. It was in November of '94.

Q What's your opinion of the MCC? This is some type of citizens group, is it not?

A It's a watchdog group, I would say.

Q And what's your opinion of the MCC?

A I think they would like to have more subpoena power, stuff like that. But --

Q But they don't have that power?

A To my understand, no.

Q And are they -- they're not a governmental group, are they?

A No. I believe it's privately funded.

Q So basically, these are just citizens coming and asking you questions; is that correct?

A Correct.

Q Now, are you aware, in the write-up, the MCC stated that Rees also acknowledged that Porteous should have recused himself from the case because of his friendship with the Marcottes? Are you aware of that?

A I just saw that yesterday. I was not

aware that I said that, but again, this was 16 years ago.

Q Do you have any recollection of saying that?

A No.

Q Do you believe it's true?

A In my discussion with them, I did not know Judge Porteous's relationship with Bail Bonds Unlimited at the time that this case was in his court in 1990. I mean, I wasn't around then. I don't know that Aubrey Wallace even worked for Bail Bonds Unlimited in 1990. So I don't know why that would have affected the motion to amend the sentence, which again took all of about 15, 20 minutes.

Now, if Aubrey Wallace had worked for Bail Bonds Unlimited when he got arrested for the burglary charge and the relationship between Bail Bonds Unlimited and Judge Porteous was what they are portraying it to be, that probably would have been reason to recuse himself from the case. But at the late stage of '94 when all we did was amend the sentence, I don't think he needed to do that.

Q Now, did you mention anything to the MCC about the Senate confirmation hearing of Judge

Porteous? Do you recall?

A I don't remember. Again, it's 16 years ago.

Q Was Aubrey Wallace eventually able to become a bail agent, to your knowledge?

A Not to my knowledge, because he had the second conviction to deal with that was in Judge Richards' court. I believe he was on parole for that at the time we did the motion to amend the first sentence.

Q And is it true that you cooperated with the FBI when they asked you questions investigating this matter?

A I don't know that I ever did, but I indicated that I would. I don't remember being questioned by the FBI, but I believe I did indicate that if they wanted to talk to me, I would be more than willing to cooperate.

Q Just to wrap up, Mr. Rees, do you believe that the motion that you filed that was granted with the Court was improper in any way?

A No, sir.

Q And based on your experience as a seasoned Louisiana criminal defense attorney, do you believe that Judge Porteous's actions in amending the

sentence and then setting aside the conviction were incorrect legal rulings?

A No. They were well within his realm of jurisdiction to do that.

MR. TURLEY: Thank you very much. Madam Chair, that's all the questions we have for now. I'm sorry, with your indulgence, Madam Chair.

Madam Chair, just as a housekeeping matter, we wanted to move in Exhibit House 69D, Porteous pages 625 to 629.

MR. SCHIFF: No objection, Madam Chair.

MR. TURLEY: And we wanted to move in House Exhibit 246. This is the transcript that we've been referring to.

MR. SCHIFF: No objection.

MR. TURLEY: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: They will be received.

(Exhibits House 69D and House 246 received.)

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Rees, from time to time during this period, did you get referrals of cases from the

Marcottes?

A I did.

Q And the first one who brought the case of Aubrey Wallace to your attention was Mr. Marcotte?

A As I remember, I believe Mr. Marcotte asked me if I would file a motion to amend the sentence.

Q And you told Mr. Marcotte you would do that?

A Correct.

Q And in fact, you talked to Mr. Marcotte about the Aubrey Wallace case before you ever talked to Aubrey Wallace?

A Correct. Mr. Marcotte explained to me he wanted to get him licensed as an agent, and to do that, he had to correct the first arrest.

Q And this was important to Mr. Marcotte that Mr. Wallace would come to work in his bail bonds company as a licensed bail bondsmen?

A I guess so. I was not involved in the daily workings of the Marcotte Bail Bonds Unlimited, but I know Aubrey worked for them for a while, and they did a lot of work in Gretna. So I assume that's why he wanted to license him to help.

Q And the reason that you would agree to do

this for Mr. Marcotte is that he would send you cases, and he asked you to do it for him?

A Correct. Well, he asked me to do it for Mr. Wallace, but it would benefit Mr. Marcotte if Mr. Wallace was licensed as an agent.

Q So you understood it would benefit Mr. Marcotte?

A Yes, sir.

Q Now, you also understood at the time that Mr. Marcotte had a very close relationship to Judge Porteous, didn't you?

A Yes, sir.

Q You understood that they had lunches together?

A Yes, sir.

Q You understood that the Marcottes were a frequent presence in judge Porteous's chambers?

A Yes, sir.

Q That probably on a weekly, sometimes daily basis the Marcottes would meet with Judge Porteous?

A For sure weekly. I'm not sure about daily.

Q Are you aware that Mr. Marcotte has testified that he talked to Judge Porteous about setting aside or expunging the Wallace conviction?

A I watched Mr. Marcotte's testimony. So yes, sir.

Q And knowing what you knew about the closeness of the relationship between Mr. Marcotte and Judge Porteous, it wouldn't surprise you that Mr. Marcotte would talk with the judge about Mr. Wallace and his situation, would it?

A No, sir.

Q And in fact, when you filed the motion to amend Mr. Wallace's sentence, it was a pretty bear bones motion, wasn't it?

A Yes, sir.

Q You assumed, didn't you, that Mr. Marcotte had already talked with Judge Porteous about the case?

A I didn't assume that. In looking at the record, the reason for the bear bones motion, it didn't have to contain anything else. The record spoke for itself, and the record would accompany my motion to Judge Porteous's chambers. That's the reason it was a half-page motion.

Q It was your understanding at the time that Mr. Marcotte had already discussed this with the judge, wasn't it?

A Probably, yes, sir.

Q You say this is a fairly bear bones issue, but actually, the issue isn't very simple, is it?

A What, to amend the sentence and invoke the 893?

Q No, the situation in which someone is sentenced, not under 893, and then wants to amend their sentence after they've executed their sentence. That's not a simple issue, is it?

A Well, if the defendant realized that if he had been informed of the availability of 893, I didn't represent him for the plea. I believe Mr. Tosh did. If he wasn't informed that he had the availability of 893, I would see where someone that was not advised of it would want to go back and then try to get the sentence amended to have the benefit of it.

Q But here you have a case where Judge Porteous sentence him on the burglary conviction and doesn't sentence him under 893; right?

A Correct.

Q And he had the discretion not to sentence him under 893; right?

A Well, if he suspended his sentence and gave him probation, that's Article 893. He just didn't use the words "893."

Q And he had the discretion at the time not to sentence him pursuant to that section, not to give him the access to later having a sentence set aside, didn't he?

A He would have to put him in jail. He gave him probation. The only way to get probation on a felony conviction would be the terminology in 893. He didn't say the words 893" when he sentence the him. Otherwise, he would have had to go to jail.

Q And he wasn't legally required to sentence him under 93, was he?

A No. He could have given him jail time, which would not have had any benefits of 893, probation, or the ability to go back and take the arrest off his record.

Q And under the statute, at least on its face, if you don't sentence somebody under 893, they're not entitled to have a set-aside, are they?

A You would have to read code of criminal procedure 893. It's not a statute. It's a codal article. But if you read it, it's it is case where if you get a suspended sentence, you're placed on probation. If you terminate satisfactorily, it's a set aside as a first offender.

Q That's if you're sentenced under 893;

correct?

A Correct.

Q And he wasn't sentenced under 893; correct?

A The only way to get probation would be 893.

Q Mr. Rees, was he sentenced under 893?

A The terminology of "893" was not in the sentencing minutes.

Q And it's also a fact under the codes that once you've begun to serve your sentence, you're not eligible to have it set aside; right?

A Unless it's an illegal sentence.

Q The sentence wasn't illegal, was it?

A No, sir.

Q The judge had the discretion to do what he did; right?

A Correct.

Q So you had to basically overcome the two code sections on their face; right? You consider that a simple matter?

A Uh-huh.

Q And let's look at your motion to amend, if we could pull up the motion to amend on the screen. And this is exhibit 82. I describe this as a bear

bones motion. If you look at your argument in favor of the motion, paragraph 1 says "the defendant was sentenced on June 26, 1990, to three years in which said sentence was suspended and two years active probation. Number 2, the defendant desires to amend his sentence to give him benefit under Article 893." In your motion, you went through none of the facts of he had a drug conviction and a burglary conviction, and he could have done this, and he could have done that, and he should have asked for this. You just said he was sentenced and we desire to amend his sentence. That's all you said; right?

A Yes, sir.

Q And so this was all the facts you set out in your motion. Someone else steps in just because you got sick, right, steps in at the last minute?

A I don't know where I was at that morning. I don't know if I was sick or --

Q So you filed this motion on September 20th, this bear bones motion, and it's heard the very next day; is that right?

A Yes, sir.

Q That's very quick justice, isn't it?

A Yes, sir.

Q You file the motion one day; it's heard

the next day?

A Yes, sir.

Q The next day, you were not there; someone else is. Right?

A Yes, sir.

Q You haven't set out any of the facts here; right?

A No, sir.

Q But in a hearing the very next day -- let's call up the transcript of the hearing the next day -- the judge grants the order; right?

A Yes, sir.

Q Now, at the end of his first statement, the judge says "all right. I've signed the order"; correct?

A That's at the end of his statement, he said he signed the order.

Q Okay. So it's nowhere in your motion you have someone standing in for you. The judge is the one who raises his understanding of the facts, and he says I'm granting the order; right?

A Yes, sir.

Q You testified earlier that the handwritten notation at the bottom of your motion to amend was that the judge said he wanted a show cause hearing

on the 22nd of September; right?

A Yes, sir.

Q You filed the motion on the 20th?

A Yes, sir.

Q On the 21st, he grants the motion; right?

A Yes, sir.

Q The show cause hearing he's ordered on the 22nd never happens, does it?

A No, sir. It happened on the 21st.

Q And in fact, he grants the order before the show cause hearing on the 22nd, doesn't he?

A Yes, sir. I can't explain that. I wasn't given notice of either one of those hearings, the 21st or the 22nd.

Q You weren't given notice, so you don't know how this happened?

A I filed the motion, and the routine thing would be to file a motion with the clerk's office. It then goes to the judge. It is set for a hearing. I'm notified of the hearing date, and that's when the hearing is to be held.

Q So you don't know how, but somehow, the day after you file your motion, the judge says I want a show cause hearing on the 22nd, and on the 21st he grants it even before the show cause hearing

on the 22nd; right?

A According to the document, that's what it is.

Q Now, you said that if you had known about the relationship between the judge and Mr. Wallace, that the judge should have recused himself; is that right?

A I don't believe Mr. Wallace had any relationship with the judge whatsoever.

Q I'm sorry?

A I didn't say anything about Mr. Wallace's relationship with Judge Porteous.

Q I thought when you were asked about your comments to the MCC you said something to the effect of well, if I had known about these other facts of the relationship between, I guess, the Marcottes and the judge, that the judge should have recused himself from the Wallace case? Is that what --

A I don't remember saying that, but again, I explained that when the case went before Judge Porteous initially in 1990, I don't believe, according to Mr. Wallace's testimony, he even knew the Marcottes or worked for them. So there was no reason for Judge Porteous to recuse himself at that time because there was no relationship between

Wallace and the Marcottes.

Q But at the time you made your motion, Mr. Rees, at the time you asked the judge to set aside or to amend the sentence, did you know that Mr. Wallace was doing car repairs and home repairs for the judge?

A No, sir, I did not.

Q If you had known that, do you think the judge should have recused himself?

MR. TURLEY: Objection to the question. It is not in the record when those repairs specifically occurred, whether it occurred at this time or not.

CHAIRMAN MC CASKILL: If you would rephrase your question, Congressman Schiff.

BY MR. SCHIFF:

Q If you had known that the judge was doing car repairs or if a judge was getting car repairs and home repairs done for him by Mr. Wallace, do you think he should have recused himself from the motion to amend the sentence and set aside a sentence?

A Probably so, yes.

Q If the judge had a relationship with Mr. Marcotte, as the testimony has indicated, where he was getting trips paid for by the Marcottes,

where the Marcottes were paying for car repairs and home repairs and giving him gifts and the Marcottes asked him to expunge this conviction of another employee, do you think the judge should have recused himself from those cases?

A Probably so.

Q Now, in his ruling, exhibit 69 D, Porteous 623, in his ruling on September 21st, the judge writes -- or says "if you want further relief, then file a petition to enforce 893, and I'll execute that also."

Is that right?

A Yes, sir.

Q You never filed a petition to enforce 893, did you?

A No, sir.

Q You didn't have to, did you?

A No, sir, because I got notice that there was an October 14th hearing on the same petition that I had filed before.

Q So you never needed to file a notice; the judge just granted it? Am I right?

A No, sir. We orally moved to invoke 894 at the October 14th hearing.

Q So the hearing set up on October 14th, you

make an oral motion then?

A Yes, sir.

Q So when the judge told you to file a petition to enforce 893, you ignored that order; is that right?

A He didn't tell me that.

Q It's written in his --

A He told Mr. Netterville that.

Q Excuse me. In his testimony, in the transcript --

A I wasn't there.

Q It says "if you want further relief, then file a petition to enforce 893, and then I'll execute that"; correct?

A It does, but I wasn't there that day.

Q But the judge did instruct the counsel standing if for you that if you wanted to take advantage of that section, you needed to file something; right?

A He told Mr. Netterville that, yes.

Q Now, you testified that the subsequent step of actually setting aside the conviction, you described it as administrative -- or you mentioned you had forms in your briefcase at the time; right?

A For expungements, not for this motion but

for an expungement, which is the last step.

Q And did you consider a set-aside to be administrative in nature, too?

A Yes, sir, because if the probation has already been terminated satisfactorily, and he's been sentenced under 893, the only thing to do is show those things, and the 893 is invoked.

Q So at the hearing where he amends the sentence, that's all he needed to do in order to be able to set it aside; right?

A Yes, sir.

Q Everything was done that he needed to do to set it aside at that point; correct?

A Yes, sir.

Q So at that very hearing on the 21st, if the judge wanted, he could have set it aside right then; right?

A I don't know. I think that you have to -- the fact that the sentence was already completed, I think he could have at that point.

Q But he didn't, did he?

A No, sir.

Q He didn't set it aside on the 21st. He put that off until October 14th, didn't he?

A Yes, sir.

Q When he could have set it aside at that very moment in September; right?

A He probably could.

Q But that September moment was before his confirmation, wasn't it?

A I didn't know that.

Q You are aware that Mr. Reynolds went to the MCC to complain about Judge Porteous's action; right?

A Yes, sir.

Q And you're aware that he later talked to the FBI about it?

A Yes, sir. I didn't know that until yesterday, but I do now.

Q Were you aware also of Mr. Mamoulides, the district attorney's, relationship with the judge?

A I knew they had known each other for years and years.

Q They had a good relationship?

A Yes, sir.

Q And were you aware also that Mr. Mamoulides had a basic policy of letting the judge decide the sentences in the vast majority of cases?

A The sentencing is totally up to the judge;

it's not up to the DA's office.

Q So you understood that if Mr. Reynolds complained to the DA, the DA's position was essentially if the judge wants to do it, the judge can do it?

A I never worked for Mr. Mamoulides. I don't know that.

Q Do you have any reason to dispute that?

A I don't have any reason to dispute it, but I don't know it to be the fact, because I didn't work for that district attorney's office.

Q Now, the hearing where -- on October 14th where the judge sets aside the conviction, I'd like to pull up that transcript. Did you get the impression at that hearing that the judge was in a hurry?

A Judge Porteous's courtroom moved real fast all the time. So --

Q And in this particular case, the beginning of that transcript reads:

"MR. REES: Your Honor, Robert Rees on behalf of --"

You didn't get to finish telling the judge who you were representing, did you?

A No, sir.

Q The judge said "I'm going to grant that." Is that right?

A Yes, sir.

Q The judge says "I've already amended the sentence to provide for a 893." Mr. Rees, "yes, sir. I might want to put something on the record."

You had to step in to get something on the record; right?

A Yes, sir.

Q If it were up to the judge, he would have just said I'm going to grant that, and that would have been the end of the hearing; is that right?

MR. TURLEY: Objection. Counsel is asking for speculation as to what the judge would have done.

BY MR. SCHIFF:

Q Was that your impression, Mr. Rees that , if you hadn't interjected to put something on the record, the judge would have said I'm going to grant that, and that would have been the end of the story?

A Yes, sir. I don't know what he was granting, though.

Q You don't know what he was granting?

A I hadn't asked him to invoke the 893 yet.

Q But the judge knew what he was granting,

didn't he?

A It appears he did.

Q I'd like to pull up a chart, one of the defense exhibits entitled "floodgates." This is a chart that the defense has used earlier. It shows some of the bonds that were set for the Marcottes by the judge in the month of October. So this is after the September hearings that we've discussed.

Were you aware on October 6th the judge had his confirmation hearing?

A No, sir, I wasn't.

Q Were you aware on October 7th that the judge was confirmed? And you can leave both those entries up. On October 7th, were you aware that he was confirmed?

A I think I found out some time the next week that he had been confirmed.

Q And you have testified that on October 14th, he sets aside the Wallace conviction; correct?

A Yes, sir.

Q If you can highlight those additions to the chart for me. I want to ask you about that week of October 14th, the week right after his confirmation. Do you know why during that week there was this bevy of Marcotte bonds set?

A No, sir, I don't.

Q And that's the week culminating in the set-aside of the Wallace conviction, am I right?

A Yes, sir.

MR. SCHIFF: I have nothing further.

CHAIRMAN MC CASKILL: Redirect, Mr. Turley?

MR. TURLEY: Thank you, Madam Chair. We would like to use that.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Mr. Rees, I know you've had a long day. You probably care to be done. I just have a few questions for you just to clarify some of the testimony you gave to Mr. Schiff.

A Yes, sir.

Q You had -- Mr. Schiff had asked you a question, and your response was something along the lines, if I'm correct -- this is regarding the original sentence by Judge Porteous in the burglary charge, and I think you answered along the lines of -- let me take a step back.

Mr. Schiff was saying did he sentence him under 893, and you said something along the lines of if he suspended the sentence, he was acting under

893.

Could you just explain that? I'm not sure you were allowed to explain that fully.

A The only provision to suspend a jail sentence and place him on probation on a felony case is under Article 893.

Q So the only alternative, if he's not sentenced under 893, is to go to jail; right?

A Yes, sir.

Q So isn't that the reason why you were mentioning some attorneys treat this as necessarily being under 893? You don't have to invoke it, because it has to be under 893?

A Yeah, that's the sentencing provision to suspend a term of imprisonment and place you on probation.

Q I also wanted to ask you about this motion. Mr. Schiff showed you your motion and said this is a pretty brief motion, you don't go through all the facts of the case.

Are these usually brief motions like that?

A Yes, sir, because they accompany the record up to the judge, and the record is self-explanatory as to what happened in the case.

Q And indeed, when Mr. Schiff brought up the

hearing that you were at and he said, you know, Judge Porteous cut you off, and you said well, Judge Porteous tended to must have things along pretty quick in his courtroom. Do you remember saying that?

A Yes, sir.

Q Was that the general nature of Judge Porteous's courtroom, that there was a lot of these motions going through, that it moved pretty fast?

A Yes, sir.

Q And isn't it true that usually these motions are dealt with pretrial, so the judge knows what's coming up and wants to deal with them on the record and move on?

A It was routine for the assistant DA and the lawyer to meet in chambers prior to going into the courtroom.

Q Now, Mr. Schiff pointed out to you that the judge had said in the earlier hearing just file to get the benefit under 893, and he asked well, you didn't file a motion.

But isn't it true that you made the motion at the next hearing orally?

A Correct, I did.

Q Was there anything strange about that?

A No, sir.

MR. TURLEY: Just your indulgence for one second.

That's all of our questions. Thank you very much, Mr. Rees.

CHAIRMAN MC CASKILL: Does the panel have any questions of Mr. Rees? You are excused. Thank you, sir.

THE WITNESS: Thank you, ma'am.

CHAIRMAN MC CASKILL: Judge Porteous has 4 hours and 25 minutes remaining and the House has 5 hours and 23 minutes remaining.

MR. TURLEY: Madam Chair, we would like to call Professor Calvin Mackenzie to the stand.

CHAIRMAN MC CASKILL: Is it Alvin or Calvin?

MR. TURLEY: Calvin with a C, yes.

CHAIRMAN MC CASKILL: Thank you. Mr. Mackenzie will take the stand.

Whereupon,

G. CALVIN MACKENZIE

was called as a witness and, having first been duly sworn, was examined and testified as follows: I do

CHAIRMAN MC CASKILL: Thank you, and you may be seated.

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Professor Mackenzie, good afternoon.

A Good afternoon.

Q I thank you for your patience today. We've met before. My name is Jonathan Turley. I'm one of the counsel representing Judge Porteous.

Just to start out, would you, please, state your full name for the record?

A My name is G. Calvin Mackenzie.

Q And you are a professor, are you not?

A I am.

Q And where do you teach?

A At Colby College in Waterville, Maine.

Q And you hold an endowed chair at that institution?

A I do. I'm the Goldfarb professor of government.

Q I'm going to put your CV, which is Porteous exhibit 61, up on the screen, and I'd like to ask you a couple of questions. Could you briefly describe your education?

A Yes. I have a bachelor's degree from Bowdoin College and master's degree from Tufts

university and a Ph.D. from Harvard universities.

Q What are the areas 24 which you teach in?

A Political science. I teach about American institutions primarily.

Q And professor, have you published on the topic of presidential appointments?

A Yes, I have. My first book was published in 1980, "the politics of presidential appointments," and I've written five or six books since then on the same topic.

Q And have you served as a consultant in any administrations or Congressional committees?

A I have often consulted with personnel staffs of presidents, particularly during presidential transitions coming into office, and have testified here on a number of occasions about matters relating to the appointment process, right.

Q And were you a presidential appointee -- actually, did you play a role in the presidential appointee project at the national academy of --

A I was director of that project, right, for almost three years in the 1980s, yes.

Q And what was that project?

A It was a comprehensive study of the entire presidential appointment process, funded by

foundations, to look at a process that seemed to be failing and to recommend ways to improve it.

Q Did you also serve as a senior advisor on the presidential appointee initiative?

A I did. That was from 2000 to 2002, a similar kind of project. We never got this processed fixed. So we keep coming back at it from different directions, and that was another effort.

Q Then in 2002, you were senior advisor again, weren't you, to a national commission?

A Yes. What's usually called the second Volcker commission, chaired by Paul Volcker, the National Commission on Public Service, yes, sir.

Q And have you previously testified in Congress about the presidential appointments and ethics issues?

A Yes, I have, on a number of occasions over the last 30 years. Most recently, this spring I testified before the Senate Rules Committee on a proposal by Senator McCaskill to end secret holds in the Senate.

Q Were you a senior research analyst for the U.S. House at some point?

A Yes, I was, in 1977 for most of the year.

Q And can you tell me what you were working

on on that occasion?

A There was a commission chaired by Congressman David Obey to examine the entire internal operations of the House of Representatives following a scandal in the previous year, and I was the senior research member of that staff, yes, sir.

Q So just to wrap this up, how long have you been studying the presidential appointments process, would you say?

A I wrote a dissertation on the Senate confirmation process at Harvard beginning in the fall of 1973. So 37 years.

Q All right.

MR. TURLEY: Madam Chair, I'd like to move Professor Mackenzie's CV, which is Porteous exhibit 1061, into the record, please.

CHAIRMAN MC CASKILL: Is there any objection?

MR. SCHIFF: No objection.

(Exhibit Porteous 1061 received.)

MR. TURLEY: Thank you, Madam Chair.

SENATOR KLOBUCHAR: I have one question. Did you testify in favor of senator McCaskill?

THE WITNESS: Absolutely.

MR. TURLEY: And there was no coaching, I

want you to know, in defense of that question.

Madam Chair, I would like to tender Professor Mackenzie as an expert in the field of presidential appointments, the appointments process, and on governmental ethics.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Okay. I think he is an expert, and we will take his testimony as such, although I find it a little strange that we're hearing an expert on confirmations in the Senate in front of the Senate. I find that is a weird twist, but we will certainly accept his expert testimony as such for the record.

MR. TURLEY: As the Chinese curse goes, we're living in interesting times, Madam Chair.

BY MR. TURLEY:

Q I'd like to turn now to the general subject of FBI background checks that are featured in this case.

Professor, let's use the Clinton Whitehouse, which is relevant here, in the mid 1990s. When they decided to nominate someone for federal judge ship, can you just outline the process that occurs in relationship to the background check for nominees?

A Well, it's an elaborate process involving a lot of paper. The first step usually is completing the Whitehouse personal data statement, which over the years has grown like top see. Each new administration tends to add its own questions to that. To my knowledge, questions are never removed from that. So there's an accumulation of questions. I think that personal data statement is up to 63 questions or something like that right now.

And then the -- normally the next step is to -- you have to fill out a lot of forms saying you're authorizing people to get into your records and to do a computer search and to look at your taxes and authorizing an FBI background check. And then you would fill out SF 86, and that would usually be the initiation of the FBI background check would follow that. Sometimes there's a supplement to SF 86. Some administrations have those and others don't tend to use them very much.

Q Do you know when this process of FBI background checks began?

A In 1953, President Eisenhower, which is, of course, the McCarthy period, President Eisenhower issued an executive order authorizing background checks for appointees who were doing national

security work in the government.

That executive order stands today, and over the years, those background checks have been expanded to cover virtually every position in the government. Nobody can serve, certainly not as a presidential appointee, and certainly not as a Senate-confirmed presidential appointee, without enduring an FBI background check.

Q Just to make sure we get where we began in the process, what was the purpose originally of those background checks during the --

A To make sure nobody was holding an important position in the national security establishment of the government who was a security risk.

Q And by "security risk," would that generally mean Communists?

A Well, it certainly did at the time, but anything that would be a threat to the security of the United States certainly.

Q Now, you've talked about the sort of snowball effect on these questions. Has there been any studies that discuss the quality of the FBI background checks?

A Well, there hasn't been, to my knowledge

at least, a specific study of the quality of the FBI background checks, but over the years there certainly have been inquiries about those. I've been involved in some of those. Whether the background -- the background check takes time, and because it takes time, I think the average now is about 44 or 45 days as sort of best case without any great complications to do a background check. And that slows the process of getting people into their jobs once the president has decided to appoint them to those jobs. So there's been some concern about the FBI background check, particularly for positions which don't seem to be national security positions, and over the years, there's an accumulation of evidence that suggests that these background checks are not very useful to most people in the process. So that's been a part of what people have looked at.

Q Now, Professor Mackenzie, you have a book called scandal proof" which is often cited in the area. I want to direct your attention to something that we read in that book where -- which we're highlighting now, where you refer to what you found in FBI files as full of, quote, nonsense, quote very poor jobs and second rate efforts.

Could you explain what you meant by that?

A That's nothing I found in FBI files because I haven't looked at FBI files.

Q I'm sorry.

A People who I have interviewed over the years, people who have worked in the White House counsel's office, people who have worked in the presidential personnel office, and people who have worked here, including some Senators and staff directors of Senate committees, who have said get this accumulation of unverified information in these files, and it's a little overwhelming sometimes.

Q And based on that question of the quality of material going into FBI question investigations, have there been calls to actually just eliminate or dramatically alter FBI background investigations?

A There have been a variety of propose over the years, the most common of which would be to limit the number of positions which require the full field investigation. You certainly probably want to look through people's records and so on -- to only those that are really national security positions -- that's been the primary qualification.

Q Are you aware of a question that is asked during FBI background checks regarding whether there's anything that could be used to influence,

pressure, coerce, or compromise a candidate in any way?

A Yes, sir, I am familiar with that.

Q Now, is that a question asked of just the nominee or other people interviewed?

A No, routinely it's asked of virtually everybody who has interviewed. I've had scores of former students who have taken government positions. So I've been interviewed myself many, many times by the FBI or contractors to the FBI about this, and I'm always asked that question.

Q Now, are you aware also of a question asked as to whether a candidate is aware of anything that might negatively -- might impact negatively on his character, reputation, judgment, or discretion?

A Yes, I'm familiar with that.

Q Now, in your interviews, have you -- in your experience, how do candidates tend to view that type of question?

A For candidates going through this process, it is extraordinarily burdensome and frightening. With very few exceptions, these are terrific people, they're the best our society produces, which is why they rise to the level of visibility where a president chooses them for an important position in

government. They have accomplished things in their life of which they're proud and should be proud, and they find themselves -- the most recent book I wrote about presidential appointments is titled "innocent until nominated." They find themselves suddenly feeling like their integrity, their life's work, all of that is being questioned and challenged, and there's a long list of very specific questions about things they may have published, things -- now everybody is required to give copies of every speech you ever gave. And of course, many of these people have been giving speeches for decades. More recently, we've added questions about your face book site and handles you might have used in e-mail and intemperate e-mails you might have sent to people. I think for mows people who go through this process, after they have answered all these questions, which now to about 200, the sense is it's all there, what could possibly be left to say, and when they get this kind of catchall question at the end, I think foremost of them, the answer is I've covered everything. The answer is no.

Q Well, indeed, in your experience, do you personally know of any candidate that's ever responded in the affirmative to that question?

A No, I don't, but I suspect they wouldn't have completed the process if they added something different to that question.

Q With regard to this question, are you aware of anyone who has ever been prosecuted or removed from their position because of the answer to that question?

A No, I'm not. Nobody has been removed from their position. There was a prosecution of Secretary Henry Cisneros at the end of the 1990s for -- the matter involved, as I understand it, a former mistress and some payments to that mistress to not reveal that relationship, and he was not truthful about that in answering questions to the FBI and was charged with lying to the FBI. And I think he pleaded guilty to that and paid a $10,000 fine, but he continued to be a cabinet member and completed his term and was not impeached or removed from office.

Q In this matter, Article IV alleges -- and I will quote it -- that during his background check, Judge Porteous falsely told the Federal Bureau of Investigation on two separate occasions that he was not concealing any activity or conduct that could be used to influence, pressure, coerce, and compromise

him in anyway or that would impact negatively on his character, reputation, judgment, and discretion.

Are you familiar with that language?

A Yes, I am.

Q And that's taking the language out of the questions we just discussed, is it not?

A Yes.

Q Let's take a look at the first one of those, which is part of House Exhibit 69(b), and in particular, pages Porteous 292 through 296.

MR. TURLEY: And this has already, Madam Chair, been put into evidence.

This is a 302 of Judge Porteous dated July 6, 1994, and July 8, 1994.

If we can specifically pull up Porteous 294, which is page 74 on the PDF, if that will help.

BY MR. TURLEY:

Q And focus on the first paragraph. You'll see a quoted section that we'll highlight on the screen. It says, "Porteous said that he's not concealing any activity or conduct that could be used to influence, pressure, coerce or compromise him in any way or that would impact negative on the candidate's character, reputation, judgment and discretion."

Do you see that?

A I do see that, yes, sir.

Q Let's bring up the second interview. Porteous pages 491 to 494. And it's at pages 272 to 273 on the PDF.

Let's specifically look at the page marked 493, and it continues into 494. And I'm going to highlight language that says, "Judge Porteous denied that he had ever signed any bail bonds in blank and stated that he was unaware of anything in his background that might be the basis of attempted influence, pressure, coercion or compromise and/or would impact negatively on his character, reputation, judgment or discretion."

That's sort of a compound question. And I wanted to ask, in your experience, is that often how questions are asked in these interviews?

A Well, that one seems to contain two different types of questions. The -- most of the questions that are asked are substantive and focus the nominee's attention to specific areas, what have you written, what speeches have you given, have you done X and Y.

And then the more general questions of what else, you know, is there anything else that you

ought to mention here.

This one seems to combine those two things.

Q Is it normal for this type of question to be asked of other --

A I don't know what normal is, but I'm not familiar with that kind of combination question. I don't think I've seen that before.

Q Let me ask you, you did have a chance to review one -- what's called a 302 involving an attorney named Bob Creely, did you not?

A Uh-huh. Yes, I did.

Q I'd like to bring up that interview. This is Creely's interview that took place on August 1, 1994, and can be found at Exhibit 69(b) and the page marked Porteous 476 to 77. And to assist, it's on pages 255 to 256 of the PDF.

And if we highlight, this contains almost the identical question on page 477.

Do you see that?

A I don't see the question, but if you can highlight that, I can --

Q There it goes.

A Right, I do see that.

Q That's basically the same question, is it

not?

A Well, it's the general question, yes.

Q Now, would it surprise you that an additional 60 individuals interviewed as part of Judge Porteous's background investigation were similar -- answered -- similarly answered that question and said they did not know anything of that kind in his background?

A As a general rule, it doesn't surprise me, because I think that would be normal in virtually every background investigation of this sort.

Q And when you say it's normal, why is that, in terms of the people you've interviewed?

A Well, I think that the people who get through the appointment process and are confirmed by the Senate obviously haven't run into these kinds of things along the way that most of the people who have been interviewed to judge their character or specifics in their life have found nothing that either the White House or the committee in the Senate or full Senate has found objectionable enough to prevent them from taking public office.

Q Now, did you have a chance to watch the testimony of an FBI agent named Bobby Hamil?

A I saw some of it, yes.

Q During his questioning, I'll represent to you, and perhaps you saw it, when asked in his 25 years as an FBI agent, he was asked whether anyone had ever responded affirmatively to this question, and he said he couldn't recall a single incidence of someone answering in the affirmative.

Did you see that testimony?

A I did see that part of the testimony, yes, sir.

Q Does that surprise you?

A No, it doesn't.

Q As an expert in this field, do you have any serious concerns about this question being used as the basis of a prosecution or removal of a federal official?

A I -- why does somebody spend decades studying something like this and writing about it? My answer to that is that I think it's very important who we get into this government. And this is a complicated government to run, and it takes good people to do it.

And we have a system for recruiting and transitioning people into government in this country that's the worst in the world. And it gets worse all the time.

I now often say I wish I could go back to what I was complaining about 35 years ago because that was much better than what we have now.

And one of the reasons it gets worse is we keep adding deterrents to good people coming into government. Even somebody now who runs into no significant problems in this process, averages about six months from the time the president says you're the person I want to the time you can actually get confirmed and take your position, a time during which people are often in limbo and they don't know what's happening and nobody can tell them and their appointment may have come up here and they don't know what's happening up here. Sometimes it's 12 months, sometimes it's longer than that.

And if we keep adding deterrents, it gets harder and harder to recruit the kinds of people we really need to make this government operate effectively.

And I think it's a concern that if -- if the legacy of this process is that anybody who neglects to mention something in response to one of these broad, general questions at the end of these questionnaires that might later come back to be used against them, maybe even to impeach them a decade or

more later, that that -- that's a lesson people are going to take to heart and they're going to be even more concerned about coming into these positions.

I am concerned about that, I do think there's a cost in all of this. And that cost is in terms of whom we can recruit to this government in the future.

Q You mentioned the general wording of the question. When you ask someone whether there's something embarrassing, for example, is there any guideline in these questions as to what constitutes embarrassment and what should be reported? Don't most people have embarrassing things in their background?

A I suspect we could all find some things in our background we'd be embarrassed if others knew about that. It's -- yeah, it's an ambiguous concept, and very difficult to apply. The history is replete with examples of people who have answered no to this question, gone into the confirmation process or sometimes even gone through successfully the confirmation process, only to have information come out later which was embarrassing to them, sometimes embarrassing to the president. And, you know, it happens.

They weren't always held accountable for that, and many in cases were not held accountable for that.

We had a circumstance of a nominee to be surgeon general in 1995, Henry Foster, an obstetrician I believe from Tennessee, who had gone through the background vetting and had answered that he didn't think there was anything in his background that would be embarrassing.

When his nomination came up here, information came out as an obstetrician, he had performed abortions. Those were legal abortions, and he didn't see anything embarrassing about that, but it caused his nomination to be filibustered and withdrawn when it got up here.

We've seen G. Harrold Carswell when nominated by President Nixon on the Supreme Court went through this process and successfully went through the vetting process, and when he came up for his confirmation hearing, information came out that he had made segregationist statements when he was a candidate for state legislature earlier in his career, and some other things that raised questions about bias on his part.

So those things -- those things happen

with regularity, yeah.

Q Now, to further understand the process before we get to some of the issues and specifically into this case, how many different forms does an individual who is nominated for federal judgeship need to fill out, at least in 1994?

A Well, personal data statement, SF 86, if there's a supplement to that, supplement to SF 86. SF 278, which is the personal financial disclosure form, which is another very complicated form, and then all of the powers you have to give to investigate your records and tax returns and so on.

Q And isn't there also a release of medical information?

A Right, right.

Q Tax check waiver?

A Tax check waiver, right.

Q So does that add up to seven of those forms?

A We're getting up there, yeah. I don't know -- I haven't been over there in the last few years, but it used to be used go over and visit with the counsel in the White House, and there was usually somebody on the counsel's staff who on the way out would go into the files and just hand you

this bag full of paper that you would take with you.

One of the things we worked on over the years was to put a kind of booklet together so at least you had something that you could carry out of there without papers flying around. It was a pretty messy process.

Q Now, actually, didn't you at one point try to develop some software to help nominees so they kept their answers consistent?

A The Presidential Appointee Initiative, which existed in the early part of this most recent decade, we did, in fact, raise some private money to put together what we thought was something like TurboTax, where you'd get a CD and it would have all of the questions that all of the forms required, and including the Senate questionnaire that you might get from the committee that had jurisdiction over your appointment.

And you could -- you could go ahead and once you filled in your name, that was the last time you had to fill in your name. When you put in your Social Security number, you only had to do that once. If there were redundant questions, of which there are a great many in those forms, you could answer that once and it would fill that in all of

the others.

In fact, we got that working and contracted out to India the software development of all of that. And for a while that was -- that was useful to some nominees. The trouble was the process changes very quickly, and new questions keep getting added and so on. And it was hard to keep up with that, and there was no government funding for it.

Q Let me address that. You said the process has changed over the years. Does it continue to change with this administration?

A This administration has added a number of questions. There are now questions about gun ownership that weren't there before. There are questions about your Internet presence, have you had a Facebook or a MySpace site, have you ever used a different name on the Internet than you do normally, have you ever sent intemperate e-mails to people.

So yeah, this accumulation of questions continues, for sure.

Q And so this process, when you refer to a sort of snowballing, it's become more cumbersome and stringent; is that correct?

A A very powerful force in this process is

inertia. Nothing ever seems to go away. Once it's in there, it stays in there.

At the beginning of the Clinton administration when there were some nominees that had problems with nannies for whom Social Security taxes hadn't been paid, that set of questions, and there were several questions about that, about household help, is in there and I suspect will be in there long after I'm dead.

And so every layer of questions that each new administration puts on, every time a nominee seems to go askew somewhere, that adds new questions to the process to make sure it never happens again, and so it gets complexer and complexer.

Q And the Senate also has the ability to ask its own questions; correct?

A It does routinely, yeah. Most committees have questionnaires.

Q So just to understand the foundations for the allegations, how many questions does a nominee in this process now have to answer?

A I would say it's about 200.

Q 200?

A 200.

Q Is it fair to say that many of these

questions are redundant, or ask questions -- the same questions in different ways?

A Absolutely, yes, sir.

Q Do all of these forms require the nominee to sign the answers under penalty of perjury?

A I think that's correct, yes.

Q Now, we're talking about the SF 86.

A Right.

Q How many people do you think complete the SF 86 every year?

A Do you mean the SF 86 or the SF 278? The SF 86 you would do when going through the process. 278, which is the personal disclosure form, you file every year. We now have 21,000 people in the government who file that every year. That is a public financial disclosure form, which is required, not necessarily that many, but the presidential appointees were required by the Ethics in Government Act of 1978 to do those and then that has expanded to others in the government.

We had an additional 250,000 senior government employees who file a confidential financial disclosure form every year.

Q All right. Let's take a look specifically at SF 86.

A Right.

Q Article IV, I believe you're aware, has said that Judge Porteous gave materially false answers to the SF 86. Are you familiar with that allegation?

A Yeah.

Q All right. Let's take a look at the specific supplemental SF 86, which is part of House Exhibit 69(b). And we're talking about page 7778 of the PDF. Let's turn to the second page of this form and look at question 10S. We're going to write that for you.

It says if there's "anything in your personal life that could be used by someone to coerce or blackmail you," "is there anything in your life that could cause an embarrassment to you or the president if publicly known? If so, provide full details."

Do you see that?

A I do see that, yes, sir.

Q Professor Mackenzie, first, there's a number of questions within that question, isn't there?

A Yes, sir.

Q By my count, there's maybe four. Is

the -- is that question unique in comparison to the other questions put to a candidate?

A Well, I think the concept of personal life is a little more detailed than some of the others. But that's -- that question covers just about everything, doesn't it?

Q In your experience, how have candidates treated or viewed that question?

A Well, I -- it's hard to get hold of people's SF 86. That's not a public document. So I haven't seen a lot of those. I have interviewed a lot, hundreds of people, who have gone through the appointment process over the years. And my sense from those interviews is that the typical answer to that question is no.

Q In fact, are you aware of anyone that has been removed or prosecuted for their answer to that question?

A For what they specifically said in answer to that question?

Q Yes.

A No, I'm not.

Q And do you know of anyone who has ever answered that question in the affirmative?

A I don't know of anyone, no.

Q Are you aware of any cases where a court has examined this type of question?

A Well, again, the Cisneros case, which we talked about, although it's not really appropriate to say that a court examined it, because he copped a plea, he pled guilty to that. So there was never really a trial there.

There was a trial involving Bernard Kerik quite recently.

Q Is this the 2009 case?

A That's the one I'm referring to, yes, sir.

Q Can you tell us what that was about?

A He was charged with lying to the FBI, as I understand it, for several -- for not -- for answering no to this question. I think in one case when he was asked this question, he said no, everything is in my book.

And the court ruled that the question was simply too ambiguous to prosecute him on, is my understanding of that.

Q And the statement "nope, it's all in my book," was that in response to whether there's something the public would want to know about, asked by a White House official?

A As I understand it, yes, sir.

Q Now, wasn't he also asked whether there was other information that could be considered a possible source of embarrassment to him, his family or the president, and Kerik said not to my knowledge?

A Yes, sir.

Q And it turns out there was embarrassing information?

A Yes, sir, there was.

Q What was the outcome in terms of those allegations?

A On those outcomes, the court -- he was not convicted on those.

Q Now, once again, as an expert in the field, do you have serious concerns about reliance on this type of question for such proceedings?

A Well, as I said before, I think it -- this is a -- the language -- all language is ambiguous in some sense. It seems to me the language here, when you're talking about what I might do that somebody else might find embarrassing, I find it very difficult question for people to answer.

If -- if I'm a female appointee, nominee, and I had an abortion at some point in my life, that's a very personal kind of intimate matter.

Those questions ask about in your personal life.

Is that relevant to my position in government? Is that going to embarrass the president? Well, it might embarrass some presidents and it might not embarrass other presidents.

Can I judge that? If I'm gay, is that an embarrassment to me? It's probably not an embarrassment to me. Is it an embarrassment to the president? Well, it might be at some times but not at other times.

I think we could go -- if something I've done was taken out of context, we had a good example of that recently with Shirley Sherrod. I suspect it's very likely she did not say that she had made a speech that would be embarrassing to the president. Then there was a videotape made that took it out of context that was very embarrassing to the administration.

So I think it's very difficult for people to know how to answer that question. And when you compound that with the reality of human life that we're all probably not very good judges of our -- our ethical towing the line.

Am I -- I was chairman of the state ethics commission in Maine for some years, and I often got

asked advice by state legislators in Maine and others about whether they had an ethical problem with something. And my first answer was always, consult with somebody else. Don't trust your own judgment on this, because we're not good at judging our own behavior.

Well, if you're a nominee sitting with an FBI agent and you're being asked these questions, it's not that easy to consult with somebody else, and you sort of run through the catalogue of your whole life, and you think I've lived a good life, I don't think I've done anything that would embarrass me.

Would that embarrass somebody else? Would you be subject to blackmail? I think in that context, it's not surprising that people typically answer no to that question.

Q Now, once again, I'm trying to explore where these questions came from and the context, we're going to get to the allegations in this case.

But you're also aware that the Senate Judiciary Committee has a questionnaire for judicial nominees; right?

A I am aware of that, yes, sir.

Q So let's turn to the United States Senate

committee on judiciary document. This is House Exhibit 9(f). This is a 36-page document. But I'd like to turn to page 34 and look at question 11, which is also cited in Article IV.

And it states, and I'll read it to you, and you can certainly look at it on the screen, "please advise the committee of any unfavorable information that may affect your nomination."

Now, in this case in response, Judge Porteous writes, "to the best of my knowledge, I do not know of any unfavorable information that might affect my nomination."

Do you see that?

A I do see that, yes, sir.

Q Now, I'm going to direct your attention to the last page of the document, to look at the date that Judge Porteous signed this document.

Do you see the date?

A I do.

Q What is the date?

A It's September 6, 1994.

Q Now, based on your experience, how do candidates generally treat this question?

A Well, I would give the same answer I gave to your other questions on this line. I think this

is -- again, it's the catchall question at the end. And typically, by the time that a judicial nominee would get to this in the Senate confirmation process, he or she would have answered similar kinds of questions many, many times going through the vetting process and the SF 86 and background check and so on. So one would assume they would answer the same way here as they did in those others.

Q I have to ask this question just so we have a consistent record. Do you -- do you know of any candidate who has ever responded affirmatively to that question in your experience?

A I don't, no.

Q Once again based on your experience, do you know of anyone who has been prosecuted or removed from their position based on their answer to this question?

A No, I don't.

Q And do you share -- from your answer, I take it you have the same concerns that you had with these other questions about how this is worded?

A Yes, sir.

Q Now, Professor Mackenzie, are there executive orders or other general regulations that direct federal employees to avoid appearances of

conflict?

A In 1965, President Johnson issued an executive order, I believe the number was 11222, which advised all presidential appointees, all government officials I believe, to avoid the conflict of interest, yes. I'm sorry, the appearance of a conflict of interest.

Q By any chance, did you see the testimony of Professor Ciolino in this case?

A I saw a good part of that, yes, sir.

Q Do you recall when Professor Ciolino was speaking about a different standard, the appearance of impropriety?

A Right.

Q Do you recall when Professor Ciolino mentioned that the appearance of impropriety standard has been removed from legal ethics codes because of its ambiguous meaning?

A Uh-huh.

Q Would you view this appearance of a conflict the same type of ambiguous meaning that is problematic to apply in cases?

A I would, yes. Yeah.

Q Because there's no -- there's no guidance, correct, as to what, you know, that appearance would

be to one person as to another?

A I believe when President Johnson issued the executive order, the intent was to be aspirational, to hope that people would be cautious about how their actions appeared.

But in terms of specifically defining what would be the appearance of a conflict of interest, there's never been any language in that executive order or in any subsequent executive order or legislation that I'm familiar with.

Q Once again, do you know of anyone who has been removed or prosecuted on the basis of an appearance of conflict of interest?

A No, sir.

Q Have you spoken with government officials in your research about this issue?

A Oh, often, yes. I -- the presidential appointee -- the Presidential Appointee Project at the National Academy of Public Administration, which I worked on in the 1980s, at that time the president of the national academy was Jack Walter, J. Jackson Walter.

He had been the first director of the Office of Government Ethics. He was appointed by President Carter and then reappointed by President

Reagan.

And Jack and I got to be very good friends over -- Jack died about a year ago, but we got to be very good friends over the years that followed. And we had many conversations about this.

He was the -- as the first director of the Office of Government Ethics, which was created by the Ethics in Government Act of 1978, he was primarily responsible for the development of what has become a significant body of case law involving ethics. And Jack's view very strongly was that this was a good standard to have, it was nice to have the words that said avoid the appearance of a conflict of interest, but there was no way you could bring a prosecution under that.

And I've had conversations with his successors in that office, and I've never had anybody say anything other than that in those conversations.

Q Now, in "Scandal Proof," did you have any occasion to speak in depth with David Martin?

A No, I didn't speak in depth -- I have talked to David Martin, but I quoted him -- I took a quote that he had given to a reporter and included it in "Scandal Proof."

Q Let me raise that question that you referred to. In here he is quoted as saying, "take a look at the language in the executive order. Might result in or create an impropriety. You can hang anybody on that language. That's my problem with it. A guy who wants to screw you can screw you. It's not a good enough standard for me."

Do you remember that quote?

A Yes, sir, I do remember that.

Q Do you agree with that sentiment?

A I do agree with that sentiment. And I agree with that sentiment primarily because I've heard it so often from people that have actually been in the position where they would be charged with bringing prosecutions or legal actions and felt they could not do that.

Q Professor Mackenzie, I want to be clear. And that is I've been asking you generally about -- all these questions and the background checks, et cetera. But you're not advocating for nominees not to be truthful in their responses.

A Absolutely not. I -- I have a certain amount of visibility because I've written a lot about this. And over the years I've been contacted dozens of times by people going through the process,

to just sort of ask -- pick my brain, is what they usually say, and ask for advice. And my advice is always be as open and honest as you can be.

Q Indeed, I want to be clear that if Judge Porteous had come to you in 1994 and asked if he should disclose that he had borrowed money from Bob Creely and Jake Amato, you would have told him to disclose as much as possible, would you not?

A I would have, yes, sir.

Q Because you generally believe that nominees should disclose anything and everything to avoid problems here, don't you?

A I do, yes.

Q But they usually don't, do they?

A Well, they disclose what they think is relevant to the case, I think would be the answer I would give to that.

Q Now, if you accept what the House has said, if you accept the allegations that there were kickbacks and money being handed over, certainly, that should have been disclosed; correct?

A Absolutely.

Q But that's if you accept what the House is alleging?

A That's correct.

Q Now, if the judge didn't believe that there was any relationship with his official duties, is it clear why he should report that?

A He -- I think every nominee is obligated to report anything which they think they might have done which could, under the language of these questions, be embarrassing or used to influence them or something like that.

Q Now, in 1994, if he had come to you and said should I reveal lunches that I've had and gifts that I've received from lawyers, would you say that that's something that he would have to disclose?

A Only if there was something improper about that. I -- if every nominee had to disclose every lunch they had ever had with anybody who they might do business with or appear before them in a regulatory hearing or something like that in government, we'd have a lot of very long answers to these questions, I think.

Q So, for example, there was a controversy involving former Senator Tower, when he was seeking confirmation for Secretary of Defense; correct?

A That's correct, yeah, yeah.

Q Would you expect that Senator Tower would have to reveal all the lunches that he might have

had with lobbyists or others?

A He'd been in the Senate for several decades by that point. I think that would have been an impossibility.

Q Professor, in your research you've come across cases of other presidential nominees that had embarrassing information revealed about them; correct?

A That's correct.

Q One of them was former Senator John Tower?

A That's correct.

Q Can you tell me what happened in that case?

A Tower had served in the Senate for several decades, he had been chairman of the Senate Armed Services Committee. And he was nominated by the first President Bush to be Secretary of Defense early in 1989.

And I -- I haven't investigated the paperwork that was part of that, but I assume that was satisfactory to the Bush administration, his answers to the questions.

When he came up here for confirmation, stories began to -- I don't think everybody up here was a friend of his. Stories began to appear that

he drank heavily, that he was a womanizer, that on trips that Senators were taking, that he had engaged in embarrassing behavior and things of that sort.

And the weight of that ultimately led, I believe, to the withdrawal of his nomination.

Q Also were there not allegations of questionable financial dealings with a defense contractor?

A There was some of that too, yeah, with defense contractors, yes.

Q And wasn't there a similar case involving a former Senator Daschle?

A Oh, recently, yes, right. And all the evidence I've seen suggests that he did not, when he was asked specific questions about his taxes, did not believe that there were problems in his -- in his taxes that would embarrass the President or cause any difficulty for him or for the administration.

And then, of course, information came out that there were such things and his nomination was withdrawn.

Q That he had not disclosed?

A That he had not disclosed, right.

Q And to be fair to these people, a lot of

the answer depends on whether you believe there's a problem; right?

A Right, right.

Q I mean, for example, there was a controversy involving justice Clarence Thomas, was there not?

A That's correct, right.

Q Involving an individual named Anita Hill; correct?

A Right.

Q But Justice Thomas always denied the underlying facts, didn't he?

A Yes, absolutely.

Q So for Justice Thomas, there was no reason for him to report this incident; correct?

A No, he didn't think he'd done anything wrong, no. Right.

Q And in your research, I'm not going to go through all these examples, but in your research, you have found many such instances of embarrassing facts that have come up in judicial nominations; correct?

A Most of the questionnaires we've talked about are part of the vetting process and the background investigation process that takes place

before a nomination actually sent to the Senate.

So anybody who had gotten to the point of having their nomination sent to the Senate would be on record in those questionnaires, typically as saying no, they didn't think there was anything else in their background that would be embarrassing to them or the president.

Then this -- this body does now these days a very -- used to be criticized for being -- just sort of rubber stamping these nominations. It doesn't rubber stamp anything up here anymore, and they have their own investigative staffs and they dig into these things. People sometimes come forward when they finally see that a nomination has been made with information that they didn't come forward with, and often these things come out in the confirmation process that hadn't come out prior to that, and sometimes they're embarrassing to the nominee and to the President.

MR. TURLEY: Instead of going through each of these cases, Madam Chair, I would like to move Porteous Exhibit Numbers 1115 through 1130 into the record as evidence.

MR. SCHIFF: I'm sorry, Madam Chair, what are those exhibits?

MR. TURLEY: These are -- we previously submitted them. These are the accounts of other controversies involving nominations.

MR. SCHIFF: These are the newspaper accounts?

MR. TURLEY: Yes, they are newspaper accounts.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Are they -- are they all newspaper accounts?

MR. TURLEY: Yes, I believe they are.

CHAIRMAN MC CASKILL: Are they just narratives that have been written by someone?

MR. TURLEY: No, they are all newspaper accounts.

CHAIRMAN MC CASKILL: They will be received.

(Exhibits Porteous 1115 through 1130 received.)

MR. TURLEY: Thank you, Madam Chair.

That's all my questions right now for the professor. I can pass the witness. Thank you very much.

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Professor Mackenzie, Mr. Turley asked you about a number of different cases involving people who had been nominated, people who withdrew their nomination, a lot of hypotheticals about potentially embarrassing facts.

As I recall, there were only two questions he asked you about the facts underlying this case, and that is if the judge had been receiving kickbacks from attorneys, was that required to be disclosed, and the answer to those questions, and I believe your testimony was yes, it should have been disclosed?

A If he had asked my advice, I would have advised him to reveal that information, yes, sir.

Q And that was clearly called for by those questions, wasn't it?

A I'm sorry?

Q That was clearly called for by those questions, wasn't it?

A In the sense that if you have -- if there is something that you believe would be embarrassing to yourself or the President or a source of influence or blackmail that has not come out in any of the other questions you've answered, yes, this would be the appropriate place to provide that

information.

Q And you would put kickbacks in that category, wouldn't you?

A Yes, I would.

Q Professor, you have studied and written a great deal on the presidential appointments process, the transition to new administrations, the need for reform. That's been a focus of your work for about 30 years. Am I right?

A That's correct, yeah.

Q And is it fair to say that you have been fairly sharply critical of the appointments and confirmation process?

A I think that would be a fair characterization, yes, sir.

Q You've described it as a national disgrace, you've said it encourages bullies and emboldens demagogues, nourishes the lowest forms of partisan combat, uses innocent citizens as pawns in politicians' petty games.

You've basically said it's malignancy, and that's just in your most recent work. Am I right?

A I'm not sure that I've used the word "malignancy," but I'm familiar with all those other words.

Q I could call it up for you.

A No, I'm sure. If you say it's in there, then I won't disagree.

Q In connection with that, you've made a lot of recommendations on how to reform the process, am I right?

A I have. I have served on commissions and panels and staffed commissions and panels that have offered recommendations, often composed of former members of the Senate and executive branch officials, yes, sir.

Q And among other things, you've recommended making fewer appointments subject to confirmation?

A That's correct, yes.

Q As we've already heard, you've recommended limiting holds?

A Secret holds, yes, sir.

Q You've recommended ending filibuster of judges?

A I would reshape the filibuster. I haven't recommended ending it. I would put time limits on it, yes, sir.

Q Now, you've also acknowledged in your works that there are significant differences between what has I think been the primary focus you've had,

and that is executive branch appointments, and judicial branch appointments. Am I right? There are significant differences?

A There are some differences. They are significant in some ways, yes.

Q One of the most significant is the judge is appointed for life; right?

A That's correct, absolutely, yes.

Q If an Undersecretary or Deputy Secretary of Transportation is later found out to have committed misconduct, what generally happens to them? They get fired; right?

A They can be fired, yes, right.

Q Or they're told resign or you will be fired?

A That sometimes happens too, yes, sir.

Q And sometimes they say they want to leave to take more time with their family, right, but they're forced out, am I right?

A Yes, sir, I've heard that, yeah.

Q But the executive branch can't force out a judge, can they?

A That's correct.

Q And, in fact, the judicial conference, Fifth Circuit in this case, they can't even cut a

salary, can they?

A No. That's right.

Q The most significant sanction against Judge Porteous in this case thus far by the Fifth Circuit is that he has to take his full salary and he's not allowed to do any work. Am I right?

A Uh-huh, uh-huh, that's correct.

Q And I would imagine that in this economy or any others, most people would think that's not a very bad sanction, to get $174,000 a year and not go to work. Am I right?

A I agree with that, yes.

Q I think in your work, you've also acknowledged that one of the other distinctions with judicial appointments as opposed to executive appointments is that there may be a very broad range of issues that go before a particular judge; right?

A That certainly is the case that there are a broad range of issues, yes.

Q So as compared with a Deputy Secretary of Transportation that just focused on transportation issues, a judge might get issues on guns or abortion or any number of very controversial issues; correct?

A Yes, sir, yeah.

Q And some of the actions of the judge may

not be subject to immediate or even any review by the Congress, in the sense that if a court holds that precedent requires a certain thing, that's not always subject to overturn -- being overturned by the Congress, am I right, if it's based on a constitutional principal?

A That's certainly the case. If it's a district court judge, there would be an appellate process for that, sure.

Q But the Congress can't step in and overturn what the judge does if he bases it on constitutional principle, can they?

A Well, we have -- probably we have examples of the Congress doing -- trying to do that or doing that in the case of moving constitutional amendments. I don't think that's an impossibility. But it's very difficult.

Q But contrast that with the Deputy Secretary of Transportation. If the Deputy Secretary of Transportation does something that the Congress doesn't like, Congress can basically overturn them; is that right?

A Absolutely.

Q Not so easy with a judge, would you say?

A I would say that's right.

Q So these are all reasons why judicial confirmation and appointment is somewhat different than an executive one?

A Oh, absolutely, yeah.

Q Isn't it all the more important, therefore, to elicit all relevant information on a potential judge's fitness for office when the only way to get rid of them is through this very process, the impeachment process?

A I would argue it's important for every appointee, whether it's in the executive branch or the judicial branch.

Q But isn't it all the more important when you can't remove them from office, except through impeachment, when there's no other -- there's no other safeguard?

A I -- I don't disagree with that, but I don't -- I don't think it's a lesser obligation for people who are going through the executive branch process.

Q You want them all to be truthful no matter what they're applying for; correct?

A Absolutely, yes.

Q Now, judges also have access to classified information in cases that come before them from time

to time; correct?

A I think that's probably correct, yes.

Q If the judge is hearing an espionage case or terrorism case, they will be entrusted with classified information?

A Uh-huh, correct, yeah.

Q And so it's all the more important -- you discussed earlier that, you know, is it really necessary to do FBI background checks of people that don't deal with national security issues.

A Right.

Q In the case of a federal judge, who may very well get a national security issue before him in a case involving espionage or terrorism or what have you, it is important to do the FBI background check, is it not?

A That's correct, I agree, yeah.

Q Now, you've suggested, I think, in some of your reform proposals and your testimony today that we should eliminate some of the redundancy in the forms that nominees fill out.

A Yes, yes, sir.

Q Now, this is an issue that you write about in your most recent book, Innocent Until Nominated; right?

A Uh-huh.

Q Correct?

A I suspect you're going to quote something, and I'd be happy to respond to that.

Q I just -- but it is something you wrote about; correct?

A In many venues over the years, I've recommended we eliminate redundancy in these forms to the extent it's possible to do that, yes, sir.

Q Now, in your most recent book, you don't recommend eliminating these questions by the FBI and in the SF 86 because they have "substantial institutional justification."

Am I right?

A I'm not sure -- it sounds like a pretty short quote. It was probably in a longer paragraph. But I have no doubt that I wrote that, yes.

Q Well, you'd agree that these questions do have a substantial justification --

A The question of redundancy is quite different from the question of the validity of the questions. I think there are a lot of valid questions. It's just that nominees get asked these same questions over and over again and get asked to repeat the information.

Often they're asked in slightly different ways. In the financial questions, for example, the way you fill out SF 278, which is a very complicated form that asks you to specify your -- the value of each of your assets in different categories, which, of course, is a moving target for most assets.

And then typically, when you come up here, you will get a different set of questions to specify your assets, often in different kinds of categories.

So we're all getting at the same question, which is are you going to have a conflict of interest because you own stock in IBM, and we make it much more complicated to get that information, I think, than we need to. That's why I've recommended that we try to eliminate duplication in some of these things.

Q And I appreciate that. But my question is about your observation in your book that there's a substantial institutional interest/justification for these FBI questions about whether you might be the subject of coercion or influence, because a judge may get classified information; right?

A I -- I don't think I specified those questions that you're -- that you just referred to as having a substantial institutional influence.

But there's certainly lots of questions in all of those forms that are valid questions, and we should be asking those of candidates for these high-level jobs.

Q Including judges?

A Including judges, yes, sir.

Q And, in fact, you go on to say in your book that the FBI may need this information to "discover security risks"?

A That's correct.

Q In your book, in fact, you develop a model questionnaire in an effort to eliminate the redundancies you talk about and preserve the questions you think are necessary; right?

A That's correct.

Q Could we pull up page 230 of your book, Innocent Until Nominated.

A This is not -- I was the editor of this book, and what you're pulling up is from a chapter written by Terry Sullivan, not written by me.

Q Are you suggesting you don't agree with --

A I'm suggesting when you edit a book -- I wrote a long chapter at the beginning of this book about an overview of the process. But when you edit a book, you don't censure what other people put in

that book. I made no objections. I tried to recruit the best people I could find to write the chapters of this book. Terry was one of those good people.

Terry is a professor at the University of North Carolina and he worked -- I worked closely with him. It was his initiative to develop the software questionnaire we were talking about earlier. But I did not develop this questionnaire.

Q But you respect him?

A I respect him, yes, but that doesn't mean I agree with him about everything.

Q And he's done a lot of research in this area?

A Yes.

Q And developed the software you testified about on direct examination?

A Yes.

Q In his recommendations for what questions should be included in the model questionnaire, he writes, "please provide any other information, including information about other members of your family, that could suggest a conflict of interest or be a possible source of embarrassment to you, your family or the President."

So in Terry Sullivan's opinion, in your book --

A I don't object to that question. I just don't think that that's a question that elicits much valuable information. And we had testimony earlier from an FBI agent who said that. And that's been my -- I don't have a value judgment to make here.

I'm just reporting on what my experience as a scholar has been, and my experience as a scholar has been that we don't find people providing answers to that question other than no, the vast majority of the time.

I don't object to asking the question. I don't think -- I just don't think it's a very useful question.

Q You not only don't object to asking the question, your book that you edited suggests this as a model question?

A That's fine. I -- good.

Q And it further suggested another question, "have you ever had any association with any person, group or business venture that could be used even unfairly to impugn or attack your character and qualifications for a government position?"

That's another of the model questions --

A Those are largely questions that do get asked now. Wording might be changed slightly, but those questions absolutely do get asked now. And again, I don't have any objection to those questions. I just don't think that those kinds of questions are easy -- I don't think they're easy for nominees to answer, because I think the question about a group you might have been associated with is a relatively easy question to answer.

But the kind of just broad catchall question that says is there anything else that you've done, I think most nominees, as I testified earlier, have thought by the time I get through all these substantive questions, I've said everything I have to say that might lead to a problem here.

Q You would agree with me, Professor, wouldn't you, that you're under the same obligation to answer a written question honestly to the best of your ability as you are to an oral question?

A I would agree with that, yes, sir.

Q So the fact that these questions are in writing, is no different, at least some of them, in the SF 86 or the supplement, it's no different than if any of the Senators had asked these questions during a confirmation hearing?

A I agree with that.

Q And if a candidate for office or appointment objected to a question on a policy basis or because he thought it was too violative of his private interests, he doesn't have a right to lie in answer, does he?

A No, no one has a right to lie.

Q And so the candidate could say, well, I don't have to answer this question, and I'm out, I don't want to go through with the confirmation process. Am I right?

A They don't want to answer this question and they're going to withdraw from the process?

Q In other words, if they disagree with a question or they don't want to answer it, they don't have the right to lie in it; right?

A No, I agree, they don't have a right to lie.

Q Even if they thought it was a bad policy reason to answer the question, they still have to answer it honestly; correct?

A That's correct.

Q No one is forcing a gun to their head to take the appointment; right? They could say I want out?

A Absolutely. And many people do.

Q And many people do. In fact, wouldn't you say that the reason why most people answer this question no is by the time they have gone through the vetting process and things have come out they don't want to be public, they withdraw? That happens frequently, doesn't it?

A "Frequently" may be too strong a term, but it certainly happens with some regularity, there's no question about that. And even more so, I think there are people who don't want to go through -- who never enter. They might be asked and they decline.

I mean, it's quite commonplace now for a president to have to go to fourth, fifth or sixth choice before they get anybody who will agree to take the job, not necessarily because they have skeletons in their closet, they just don't want to go through this.

They don't want people poking around and misconstruing something they might have done that they don't feel badly about, but it becomes a cause celebre in this process. It's frightening to many people.

Q People -- I don't have any question that there are good people who are discouraged from

pursuing the confirmation process because they don't want to go through it. But you also have a lot of people who begin the process, negative information does come out, and they withdraw. Am I right?

A Again, I'm not sure "a lot" is the right characterization, but certainly that happens, yes, sir.

Q Now, you also commented in your book, didn't you, and you described sort of the thickening of the process?

A Yes.

Q Multiplying of the questions, multiplying of, you know, who is asking for what. You described it as a thickening of the process; right?

A Yes.

Q You did point out that one of the positive things of the thickening of the process is that it made it harder for the rogues to hide; right?

A I -- I would agree with that. I don't remember that I wrote that, those words like that. But I -- yeah.

Q If information came out before confirmation that a candidate for judge took kickbacks from attorneys in exchange for the official act of sending them curator cases, would,

in your expert opinion, that be unfavorable information that would affect that nomination?

A If it were true, yes, it would be.

Q It would kill the nomination, wouldn't it?

A I think it probably would, yeah.

Q And a reasonable person would understand that, wouldn't they?

A Yes, I think so.

Q That wouldn't require a level of insight of which no ordinary person is capable?

A No, I agree with that. Yeah.

Q If information came out before a confirmation that a candidate set bail in amounts to maximize the profits of a bail bondsman who was paying for their trips and their meals and their car repairs and their auto repairs, would that be unfavorable information that would affect the nomination, in your opinion?

A If there was a connection there and it was factually proven, yes, sir, it would.

Q And, in fact, would kill the nomination, wouldn't it?

A I suspect that's the case, yeah.

Q And a reasonable person would understand that?

A I think so.

Q Doesn't require any dramatic insight into human nature?

A No, I don't think so.

Q If information came out that a candidate expunged convictions or set them aside at the request of a bail bondsman who was doing all these things for the judge, that would also be negative information that would affect their nomination?

A If that were factually accurate, yes.

Q And a reasonable person would understand that?

A Yes.

Q And again, no superhuman level of insight necessary?

A No, I don't think so.

Q Are you aware of evidence in this case that's been presented that Judge Porteous told a bail bondsman that he would set aside the conviction of a bail bonds employee, in this case Mr. Wallace, but only after his confirmation because he essentially didn't want to blow a lifetime appointment? Are you aware of that evidence?

A I -- I have -- I have a day job, so I haven't been able to watch as much of this on C-SPAN

as I would have liked to.

So the facts I've picked up one here and one there, or at least testimony here and there. And I'm not confident in my characterization of that.

Q Well, if the evidence was that a bail bonds employee said that he discussed setting aside convictions with the judge and the judge said in one case he would do it but only after his confirmation because he didn't want to blow a lifetime appointment, would that, in your expert opinion, indicate that he was aware that the set-aside or expungement would negatively affect his confirmation?

A Are you asking me a hypothetical or are you asking me to reflect on testimony in this case? I'm not quite --

Q You said you're not aware of the evidence in the case, so treat it as a hypothetical.

A Hypothetically, I think anything one does which violates the law or violates the legal process in some way that were to be raised as part of the confirmation process would be a problem in the confirmation process, if it were true.

Q But my question, Professor, is a little

different than that. My question is if there was evidence that a judge said I'll do this, set this aside for you, bail bondsmen that are helping me out here, I'll do this, but only after my confirmation, because I'm not blowing a lifetime appointment, wouldn't that indicate to you that they had knowledge that this would affect their nomination if it came out?

A It would indicate that to me, yes.

Q I want to ask you about one of the arguments the defense has made in this case in their motion to dismiss Article IV.

"Article IV," if we can pull up motion to dismiss, page 15, "Article IV is an open invitation to the Senate to substitute its collective judgment for Judge Porteous's evaluation of what he found to be embarrassing or inappropriate. It invites the Senate to aspire to levels of insight of which no ordinary person is capable."

Do you agree with that claim?

A Well, it seems to me there's several things in that statement.

Q Let me rephrase that. Do you believe that the Senate would need to aspire to levels of insight to which no ordinary person is capable in order to

conclude that a judge would understand the disclosure of his receipt of kickbacks would negatively affect his confirmation?

A I think it's hard to see inside another person's mind and their assessment of their own situation. I think that's the -- that's the root problem with this question about embarrassment.

I mean, what -- what a reasonable person might say ought to be embarrassing may not be embarrassing to a person who says it's not embarrassing.

Q We're not talking abstractly now, Professor. We're talking about the situation where a judge has received kickbacks.

And my question is, do you agree with this defense argument, that in the case of a judge who receives kickbacks prior to his nomination, that it would require some -- it would require -- invite the Senate to aspire to levels of insight of which no ordinary person is capable in order to conclude that a reasonable person would know receipt of kickbacks would negatively affect their confirmation?

MR. TURLEY: Madam Chair, two objections. One, the congressman is now asking the witness to comment on a motion to dismiss that the committee

itself is not going to rule on, but more importantly, he's assuming a fact in evidence of kickbacks that we obviously contest.

CHAIRMAN MC CASKILL: Well, I will overrule the objection in that I don't think that the witness is an expert in issuing opinion on the defense's strategy as it relates to the impeachment.

I think there are ways you could reword the question, Congressman, that would get at the point you're trying to make.

BY MR. SCHIFF:

Q Let me just ask you this way. Do you think it requires a level of insight of which no ordinary person is capable to recognize that someone up for confirmation for the lifetime appointment of judge would understand if they disclosed the receipt of kickbacks, it would kill their nomination? Does that require some superhuman level of insight?

A Not if they understood that they had received kickbacks for -- for something they had done, no, that doesn't require extraordinary insight.

Q I'd like to ask you to comment on some of the testimony of the constitutional law and appointments experts that testified in the House.

This is testimony that will be a part of the record in this case or already is a part of the record in this case. And I'd like to see whether you agree with what the experts testified to in the house.

I'd like to start with Professor Akhil Amar, constitutional professor at Yale law school.

If we could pull up page 17 of his testimony in the house. And Professor Amar testified, "in this particular case, it is not even clear the removal from office is really punishing Judge Porteous by depriving him of anything that was ever rightfully his. Rather removal from this office simply undoes an ill-gotten gain. It ends a federal judgeship that he should never have received in the first place and never would have received but for the falsehoods and frauds that he perpetrated while being vetted for this position here on Capitol Hill."

Would you agree with that?

A I'm not sure what you're asking me to agree with here, Congressman.

Q Would you agree with that testimony?

A I think that requires an understanding of the facts of the case that I don't possess to make a judgment on that.

Q Let me ask you about his testimony further on that page.

"Let's take bribery. Imagine now a person who bribes his very way into office. By definition, the bribery here occurs prior to the commencement of office holding. But surely that fact can immunize the briber from impeachment or removal.

"Had the bribery not occurred, the person would have been an officer in the first place. This is a view, as is almost everything I'm saying here, that I committed myself in print to long before these hearings. And my written testimony contains more of the details of what I and other scholars have written before on this matter."

MR. TURLEY: Objection, your Honor -- objection, Madam Chair. There was an understanding that we would not be soliciting testimony on the standards or meaning of impeachment.

This material goes into these standards. We agreed that it was up to individual Senators to decide what was an impeachable standard.

CHAIRMAN MC CASKILL: But Mr. Turley, in your opening statement, you said -- you, in fact, argued that this case did not rise to a level that would support an impeachment. So I think you have

injected what standards we should use as it relates to impeachment. You -- in fact, the very essence of your case, you have argued that this case does not reach a certain standard that we must achieve.

So therefore, I think that the door has been opened for this witness to testify, if he can, and if -- as to whether or not he agrees with evidence that has been placed in the record by another law period of time.

MR. TURLEY: Madam Chair, if I can simply add to this objection, the -- the discussion we had was that we would not solicit testimony from witnesses, not that we would not argue the merits of the case, but that we would not solicit testimony from expert witnesses on the meaning of impeachment.

And if we don't have that, then we would have -- obviously, we would have called witnesses on the standard of impeachment.

But the differences between argument and soliciting testimony from experts on what the Senators should believe or understand is an impeachable offense.

CHAIRMAN MC CASKILL: Why doesn't counsel approach for a moment, both of you.

(Discussion off the record.)

BY MR. SCHIFF:

Q If I could direct your attention to page 18, third full paragraph, I want to ask you if you would agree with this testimony of Professor Amar before the House.

"And in the case of Judge Porteous, as I understand the facts, here are some of the things I would stress. He gave emphatically false statements to direct albeit broad questions. These emphatic falsehoods concealed gross prior misconduct as a judge in a vetting proceeding whose very purpose was to determine whether he should be given another judicial position with broadly similar power."

Would you agree with that?

A Again, if you're asking me to reflect on the facts of whether his answers to those questions were as they are alleged to be here, I -- I simply don't know the facts well enough to answer those questions.

Q Professor, that's fine. If you don't know the facts well enough, then that's all you need to say.

A Right.

Q If we could turn to page 34, turning to the second-to-last full question. "Third, yes, the

questions were broad, partly because it is impolite to be more specific, especially without any basis for this, but everyone knows what is actually at the core of the question. Are you an honest person? Are you a person of integrity? Do you have the requisites to hold a position of honor, trust and profit? Do you have judicial integrity? That is at the core of all these questions. That is not at the periphery."

Would you agree with that?

A Yes, I would.

Q He goes on in the last paragraph of this page 34, "so I don't think the hearings Michael," he's referring to one of the other experts, "is absolutely right. It would be really unfortunate if you had to ask specific questions of a Green Eggs and Ham variety. Were you a crook in a box? Were you a crook with a fox? Were you a crook in the rain? On a train? You know, we know what those questions at their core was about. And he lied at the core. There was a vagueness at the periphery, but this was really central."

Would you agree with that?

A I'm happy to stipulate as a general matter, people should tell the truth and that judges

should be honest people.

When we get into the facts of this case and whether, in fact, the answers to these questions were fraudulent in some way, because the judge was not being truthful, I think that's a fact question, and I'm -- I just don't have the facts.

Q Let me turn, if I could, to Professor Michael Gerhardt, University of North Carolina, has also written a book on this process. Are you familiar with Professor Gerhardt?

A I don't know him personally, but I know his work, yes, sir.

Q And you respect his work?

A I do.

Q On page 42, he talks about the no answer to these questions in the third full paragraph.

"That no is quite problematic, and I would analogize it in two different ways. I mean, the first is I do think there's an obligation to answer that question and to answer it honestly. The honest answer would be forthcoming with information. And there's no secret about what that question is seeking. Common sense alone I think would suggest to us what's the kind of information that ought to be revealed.

"But I'd go a step further. But all of us have studied the process of judicial appointments, and the other thing to keep in mind is that the question gets asked not just in writing, but it's going to get asked in person, over the phone. It's going to get asked more than once in the process of being considered for nomination. So seen if it doesn't up in a form like that, there's a problem and there's a failure to disclose. This just makes it all the more problematic because there's a formal requirement, and the failure to answer is clear evidence of the defrauding of the Senate in this circumstance. Based on what you know of these facts, are you able to express an opinion whether you agree --

A I don't have an opinion on the on the last part of that, on the general part, but again as people ought to answer questions as honestly and fully as they can, I've testified to that. But I've also testified this is a question that most commonly elicits the answer no.

We can all speculate on what the reasons for that are, but I think as I've testified, I think it's because people think they have answered the specific questions that Professor Gerhardt mentions

here over and over again and the catch-all question at the end, and I use the term "catch-all" because I've so often heard it referred to in that way, is one that doesn't yield much useful information.

Q Let me ask you further down on that page. Professor Amar testifies immediately after this, "and it's not -- the no covered up not just mere private failings, you know, back in the third grade I dipped Suzie's pigtails in an ink well. This isn't just private. It's misconduct as a judge, it's taking cash from envelopes from lawyers who have cases before you. And the only reason, and don't be too tender, he was not in some trap here. All he had to do was simply say I do not wish to be considered for this position.

"This is not like some independent counsel going after you and now you're in kind of a perjury trap or anything like that where there's the exculpatory no doctrine, which the Supreme Court has rejected, by the way. It's nothing like that at all. If you don't want to put yourself in an awkward position, don't put yourself forward in this way."

Do you agree with that?

A I agree that you have the option, if you

don't want to answer questions that might be embarrassing to you, that you can withdraw from the process or never enter the process, yes, sir.

Q Finally, let me ask you about something professor Gerhardt says on page 43. Middle of the page, Mr. Gerhardt says, "If I may, I just want to add one more thing that reinforces what's been said. Just imagine what happens if you don't act here. What kind of precedent does that set? It says to people that you may take this road in the nomination process and confirmation process, that is to say you may undermine the integrity of those processes because it's okay. That's a level of corruption we can tolerate.

"It seems to me that the answer here is quite clear. That's not a level of corruption we should tolerate."

Do you agree with that?

A Well, I don't agree that that's the legacy of -- of this process, and I testified earlier that I think the opposite legacy is equally worrisome, and that is that people will read this -- this process as one that says oh, my God, there might be something that I've done that I don't think is embarrassing or is subject to influence me and

somebody else later says they think it is and I can be prosecuted or impeached on that basis and I'm not willing to take that risk so I'm not going to take this appointment, that's part of it.

I don't think anybody could reasonably understand the 200 questions you have to answer here to get through this process and think that it tolerates a level of corruption.

Q Well, we're talking not about in the hypothetical now. We're talking about this case.

In a case involving kickbacks, isn't the lesson people are going to walk away with, well, is that a level of corruption that we can accept?

A Kickbacks, a level of corruption we can accept?

Q Yes.

A Are you asking me to reflect on the facts of case or are we hypothetical? It's a little hard to follow where we are here.

Q If you're -- make it hypothetical since you -- you're not familiar with the facts fully.

In a case where a judge has taken kickbacks, do you think that's a level of corruption that we can accept?

A No. And I think I testified to that

earlier. I don't think any of the specifics you asked me earlier are acceptable.

Q Do you think 200 questions is too much to ask someone for a lifetime appointment?

A Well, I think some of those questions are redundant, and that's -- and I want to reduce that redundancy. I don't know that there's a magic number of questions. I'm not sure we need to know your in-laws' addresses when they were growing up and those kinds of things that we ask these people.

But I -- you know, I think a full examination of the backgrounds of people who are going to hold positions of significant decisionmaking in our government is appropriate.

Q Finally, Professor, you mentioned the Cisneros case and I think you testified that he pled guilty and nonetheless continued to serve out his term as secretary.

A Right.

Q Were you aware he finished his term in 1997 and pled guilty in 1999?

A He was in -- I'm sorry, the facts on that?

Q Yes, that Secretary Cisneros finished his term in '97 and pled guilty in 1999?

A If I testified that he continued in

office, what I meant was he was not sanctioned, he was not impeached for doing that, in fact was pardoned by President Clinton later for doing that.

Q He hadn't pled guilty until after he left office; right?

A I -- I would have to review the timing of that. I'm not certain.

MR. SCHIFF: Nothing further, Madam Chair.

MR. TURLEY: Madam Chair, we just have a very brief redirect, I promise.

CHAIRMAN MC CASKILL: Okay. I'm smiling.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Professor Mackenzie, you're very close to being done with us, not necessarily the panel. I just want to clarify one thing. Mr. Schiff had initially attributed a model series of questions to you that were contained in your book Innocent Until Nominated.

Now, I just want to be -- to just be clear. You were the editor on that book; correct?

A That's correct, right.

Q And the way that academics do edited books is that you don't endorse the individual chapters that are submitted to a book of that kind, do you?

A In fact, often you try to get conflicting chapters, right.

Q And in this case, while you have a lot of respect for Professor Sullivan, you don't agree on everything, do you?

A That's correct.

Q And I just want to confirm something that you said. You told Mr. Schiff that you don't object to questions like embarrassment questions; you just don't rely -- you don't think you can rely much on those questions; is that correct?

A Right.

Q Can you explain briefly why?

A Well, I -- I guess there's no great harm in having those questions. I just think -- I'm just recounting my long time of looking at the results of those questions, and the results are -- are tiny. There's just nothing of consequence that comes out of those questions. And maybe that says to us that these are not very useful questions. Should we keep asking them? I think if people want to ask them and with the possibility that they might yield some valuable information, I'm not terribly troubled by that.

But historically, they haven't yielded

much valuable information.

MR. TURLEY: Thank you for your time today, Professor Mackenzie. Madam Chair.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q Professor, I understand that you are looking at this from the broad public policy perspective of, you know, who is being attracted to government.

A Right.

Q And what kind of water torture, I shouldn't use the term "water torture," what kind of problems are we causing them that are discouraging them from serving.

But I'd ask you for a minute to look at the other side of that public policy question. And let's assume that someone gets called by the White House and is told that they are going to get an appointment they want very, very much.

And at the moment they get that call, they know they have done things that if it comes out, they won't get the job.

Now, let's walk down the public policy path of that scenario. As opposed to the flurry of questions and the paperwork and the duplications and

the redundancies, let's look at that scenario.

Someone wants a job very badly and they know that if certain information comes out, they won't get it.

In that circumstances, the person who wants that job has to make a choice.

A Absolutely.

Q They have to answer the catchall question honestly and not get the job or they have to lie on the catchall question and hope that they get through the process without anyone discovering the information that would disqualify them. Would you say that's a fair assessment?

A If -- with a small caveat. If they believe that they have done something wrong that would disable their nomination, yes, I think they have to make that choice.

Q I'm asking you to assume that they know they have done something wrong that would disable their nomination.

A Then they have to make a choice, right.

Q Or they have done something that is so full with the appearance of impropriety even that it would ruin their nomination, either one.

A Right.

Q And I would assume that taking money from lawyers for cases that you'd given them in order -- that would probably be a category that would be a fact that would be disqualifying?

A I would think a reasonable person would think that, yes.

Q So the catch-all question, there are catch-all questions in many interviews.

A Right.

Q There's catch-all questions when detectives interview witnesses, there's catch all questions when journalists interview public figures.

A Uh-huh.

Q And one of the reasons the catchall questions is there is to make sure someone after the fact said, well, you never asked me that. Well, if you would have asked me that question, I would have told you.

Well, if somebody had just posed that question to me, of course I would have been forthcoming.

So in that context, can you not see any validity -- I mean, what I'm worried about a little bit from your testimony today, I admire your work, I think -- I mean, is there any doubt in your mind

that if someone skated through that process, didn't disclose information and there was no catchall question, don't you think their defense would be, well, no one ever asked me something like that, no one ever asked me that specific question, no one -- there was no specific question that addressed that?

A I suppose that could be a defense, yes, ma'am.

Q And that's -- that's the thing that I find troubling about this -- you know, believe me, I understand, as someone who is -- has been very involved in looking at the process and the problems we have internally with the confirmation process, you're not going to get any argument from the chair about the problems we have with the confirmation process.

But I worry that if we just look at it, the barriers of good people coming to public service, and don't look at it as the process has to be a cleansing one also.

And I would point out for the record I think in both Senator Tower's instance and both Senator Daschle's instance, in both those instances, the information came out and they withdrew.

A Right.

Q And in the third example, I believe, that Mr. Turley gave you, Clarence Thomas, the information came out and it was then incumbent on the Senate to determine which set of facts they wanted to believe. And the Senate made a collective judgment and Justice Thomas was confirmed.

A Right.

Q But in all of those examples, the damaging information became public.

A Right. I believe I answered that question in response to a question about whether they had been sanctioned for not answering anything other than no to the question during the process. And while that -- the information came out that they had done things that were embarrassing enough for that -- for those nominations to be withdrawn or very closely combative in the Senate, none of them were sanctioned on that.

I would just -- if what I said is misinterpreted, I want to clarify that. I'm not opposed to the catchall questions. I was just reporting the results of my scholarship over the years, which suggested those have not yielded significant information during this process.

Q I would say most people that -- with the

catchall question, if they answered it completely and truthfully, if it was going to disqualify them, they probably don't answer it. Wouldn't you assume?

A I would, yeah.

Q They probably would just say I'm not interested in the appointment?

A Right, yeah.

CHAIRMAN MC CASKILL: Okay. Any other questions from the panel?

EXAMINATION

BY SENATOR RISCH:

Q Professor Mackenzie, I've been sitting patiently through this lengthy testimony here. To be honest with you, I don't think I'm any smarter than I was when I sat down, and I want to find out if I missed something.

The only thing I got out of your testimony -- this committee has heard that Judge Porteous was involved in a couple of conspiracies, one of which was that he knowingly, willfully, and intentionally entered into a corrupt scheme to get kickbacks from a bail bondsman and then the same thing with handing out cases.

And you testified, I think I heard you say, that should have disqualified him from getting

the job in the first place. And it should have disqualified him from continuing on in office.

Is that your testimony?

A I answered that question hypothetically. If the facts were correct, my answer was yes to those questions.

Q If you didn't follow the facts -- have you read about the facts of this case, what the judge is charged with?

A You've sat here and listened to the testimony, and I haven't had the opportunity to do that, sir.

Q So if that's what we got out of the testimony, you would agree with me that the conclusion is that he shouldn't have been confirmed in the first place and he shouldn't be holding his office any further?

A If those facts are true, yes.

Q Have I missed something else -- I appreciate all the esoteric discussions about the questions that are asked and all that sort of thing. I got all that. But what does that tell me about how I'm supposed to reach a decision in this case? Am I missing something here?

A I don't know if you're missing something.

I would say that historically, two things. Number one, that the questions about which I was asked here, which I guess relate to Article IV of the impeachment, that he's charged with lying to the FBI because he answered no to these questions, I was called as an fact -- as an expert witness because I've studied this question. And my evidence -- my testimony was that that's the common answer to these questions, that it is the norm.

The other thing I was asked about was whether this was -- whether anybody had been sanctioned for that, and my answer was that people are not sanctioned for that.

Q I gathered from your testimony, you also felt that these questions shouldn't have been asked of him in the first place, they don't get to --

A I didn't testify to that. I didn't have any objection to these questions. I just testified that my findings were that these have not yielded useful information most of the time.

Q But you would agree, if it turns out that they're false, that's a problem?

A Absolutely.

SENATOR RISCH: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Senator Kaufman?

EXAMINATION

BY SENATOR KAUFMAN:

Q To follow up on Senator Risch's comments, which I think is on point, isn't it possible or probable that most of the people answer no because they don't have anything in their background that's embarrassing to them?

A We would hope that's the case, yes, sir.

Q Isn't that probably the reason why they say no? Looking back on our history -- we've done thousands of these, and we can come up with some few cases of people who have lied on that question, and most people say no, and it turns out to be no.

So isn't the relevant thing exactly what Senator Risch said? In this specific case, if, in fact, the hypothetical is true and if we reach that judgment, then this question is a good way for us to say clearly the judge knew at the time he was confirmed, he answered this question no. If he answered this question yes -- and therefore, that's the reason why we should proceed with what we're doing?

A That's certainly a judgment you could make, absolutely.

Q We could go to the other questions on the

200 questions or whatever we've got and say you didn't answer that properly. You're an expert on Congressional hearings. Isn't one of the biggest reasons we have financial disclosures is so people don't -- on financial disclosure, if they don't put in the financial disclosure, we know it's kind of evidence that maybe they've done something wrong?

A If they don't disclose?

Q Yes.

A That's a crime.

Q Yes, it is.

But they have to make that decision. So they have to either state publicly I got the condo from the guy down in the Virgin Islands, he's got to either put it in there, or if they don't put it in there and we find the condo, they can't say gee, everybody knows I have a condo in the Virgin Islands.

Isn't that the reason for this question here, that the reason we have this question here is so that after the fact we can come back and say you didn't answer that question right, and isn't that cause for concern?

A If a person didn't answer that question, yes, it is.

SENATOR KAUFMAN: Thank you.

CHAIRMAN MC CASKILL: Any other questions from the panel?

The witness is excused. Thank you for your time.

THE WITNESS: Thank you.

MR. TURLEY: Madam Chair, Professor Mackenzie is our final witness, and the Defense rests.

CHAIRMAN MC CASKILL: Okay. I think that we have just about everyone here, and I think if everyone will remain for a moment after we adjourn -- first of all, does the House have any rebuttal witnesses?

MR. SCHIFF: No, Madam Chair. We do have the remaining issue of all of the exhibits.

CHAIRMAN MC CASKILL: I was going to get to that. I would ask the members not to run off, because we're going to try to take a photograph in five minutes. Oh, they're gone. The photographer's gone. Never mind. We're not going to take a photograph. We will try to take one when we reconvene to vote on the report.

We do have the remaining issue of the exhibits, and I've got to gently scold the House,

because I had hoped that you would have submitted the list to the other side on Friday or Saturday or Sunday and that there would have been an opportunity for the Porteous defense team to look at the list of exhibits you want to put into evidence.

Let me ask this: Mr. Turley, do you have all of the exhibits for the judge in evidence that you want in evidence?

MR. TURLEY: Your indulgence of one second, Madam Chair.

Madam Chair, we believe with the exception of one or two documents, we've moved all the documents we need to move in. We wanted to check the list against a couple of documents that we thought had been moved in but is not currently on the list. And so I think that would be one or two documents at the most.

CHAIRMAN MC CASKILL: I'm going to charge the two of you to get together and come up with a final list of exhibits that you object to, that one side objects or the other side objects. In other words, I think we've been pretty open and I think you should assume, Mr. Turley, that, you know -- I'm not saying every exhibit will come in, but we clearly have been fairly liberal about the kinds of

exhibits we've let come into evidence, and I think there have been fairly few objections on each side.

I hope we don't get bogged down with objections in terms of the list of exhibits that the impeachment team from the House wants to put in, and vice versa. But if you all -- it's my understanding you just saw the list from the House today?

MR. TURLEY: At 3:10, we were given a list of, I think, 480 new documents that they wanted to move in.

MR. SCHIFF: Madam Chair, can I raise an issue?

CHAIRMAN MC CASKILL: Sure.

MR. SCHIFF: I think that -- and I may be proved wrong, but I don't think that my colleague will object to probably the vast, vast majority of the exhibits we wish to introduce. There is one issue, though, I think they may object, I don't know, but it may be worth raising this issue now. I think it may be the only serious issue that is in contention, and that is this: We believe that since the Defense has maintained that the Senate knew all this information already, that the Senate knew all these facts about the judge at the time of confirmation and, therefore, it's some kind of form

of estoppel, we think that the Senate ought to have access to the FBI background file in this case.

We're basically being asked to prove a negative, that the Senate didn't know. The only way to prove a negative is by showing what was in the file.

Now, that file contains 302s, and I understand the Chair has expressed a view on the 302s, we would not be offering the 302s for the truth of what's in them, but we would be offering all the contents of the file for the purpose of showing that, in fact, the Senate did not have the information that has come out during this trial.

And I expect there may be an objection to that. I don't know. I would hope that the Defense would similarly want the background file in to show what they think, which is that the Senate did know. But I wanted to flag that issue, because I think all the others are fairly minor and nonexistent.

MR. TURLEY: Madam Chair, indeed, I think we can reach an accommodation. I do think that the committee needs to look at some of those, but the document that Congressman Schiff is referring to is about 311 pages, and we just want to be able to look at it and work with the House on it.

CHAIRMAN MC CASKILL: I think that's great. I think if you can come to an agreement -- I'm going to ask you all -- we're going to give you a week, a week from today. I would expect you all to come with the final list of documents that you all are agreeable about coming into the evidence and those that you may want to put in that the other side objects to.

And if, for example, you have one where you're saying Congressman Schiff, we're not offering it for the truth of the matter asserted, but, rather, to go to the body of information that the Senate did have not in its possession at the time of confirmation, you should note that. In other words, I don't want motions on all of them.

I just want you to note for what purpose you're offering the exhibit, if there is an objection. Then staff will take those, and they will do a preliminary, and everything will come in that you all don't object to. And then if there's anything else that we need to decide, we will call the members together and go over those issues then.

You should assume, unless we get back in touch with you, that the next part of this case will occur after Thanksgiving. It is the intention of

the committee to -- oh. It's the intention of the committee that the report will be prepared by the staff and distributed to the members of the committee prior to us returning after the October work period so that we would meet on it some time the week of November 15th to vote on the report so the report can be printed.

And I think what might be best so that I don't have to try to get seven people together next week, I would entertain a motion that the committee delegate to the Chairman in consultation with the Vice Chairman the duty of admitting any additional documents into the evidentiary record.

(So moved.)

CHAIRMAN MC CASKILL: Not everybody at once here. Is there a second?

(Seconded.)

CHAIRMAN MC CASKILL: Discussion on that motion? Any discussion? All those in favor?

(Unanimously agreed.)

CHAIRMAN MC CASKILL: Opposed?

The Chair and the Vice Chair will consult on any evidentiary issues that remain after you all have a week to fight to sort them out.

Let me defer now to the Vice Chairman, who

has been such a great support for me during this entire process.

VICE CHAIRMAN HATCH: I'm very grateful for your leadership as well on this committee. You've done a terrific job. But so have the attorneys on both sides. I've been very impressed with the way you've handled this.

I have some reservations about disclosing the questionnaires of any judicial person. The fact of the matter is, I've seen a lot of them and reviewed a lot of them. And I have to say, for Professor Mackenzie, the reason everybody answers no is because the ones who have answered yes are not nominated and don't have a chance of getting nominated.

I'd just like to reserve some judgment on just exactly whether or not we should allow background reports into evidence, although we will probably rule in favor of doing so in the end, but maybe not. And I'm very concerned about that because with the experience I've had in the past on these. Not everybody gets to see those. Members of the committee do not always get to see those, unless we have a major, major -- but if there's a major problem, good chairmen make sure that everybody is

briefed.

So let me just say, Madam Chairman, I want to reserve judgment on just how we handle that particular exhibit or those particular exhibits. I'm a great believer that you both ought to have full opportunity on something as serious as this to present the best cases that you can.

And I think Madam Chairman has done an excellent job in allowing almost everything you've wanted in on both sides, and I think that's the way this ought to be. But thank you. I just really appreciate the way you've handled this.

CHAIRMAN MC CASKILL: Thank you.

I think we can -- and I will let you all know that if Senator Hatch and I don't agree, then we would go the next step of pulling the entire committee in for discussion. But I think so far -- we've really worked at finding some place to disagree, and we haven't found it yet.

(6:00 p.m.)

VICE CHAIRMAN HATCH: I expect we will agree.

CHAIRMAN MC CASKILL: And I expect we will agree also.

I want to thank both teams of lawyers and

all of the witnesses for their cooperation. I particularly want to thank the members of the committee for giving us an incredible amount of time in incredibly busy schedules.

Finally, I want to take a moment to thank the staff of the committee. They have worked very long hours. I would bet they've worked almost as long of hours as you all have in preparation. I'm getting a signal that no, they haven't. I know they were here very, very late many, many nights preparing for this.

This is harder than it looks to make all this work smoothly, from keeping track of the exhibits to keeping track of the time to keeping track of the Senators. This has been a difficult job, and I want to thank the staff for their hard work.

I think we have conducted a proceeding that will stand the test of time, and I think everyone on the committee should be proud for the commitment they've made in this process. I think it's an important one for our democracy.

Unless the parties have anything else to add --

SENATOR WHITEHOUSE: Madam Chair, I just

wanted to remind the House I have a request pending, and I hope that has not been overlooked.

MR. SCHIFF: No, Senator. You preempted me. There were two points I was going to make. One was we're going to respond to the request you made for the information that's come out since the Fifth Circuit, and we will provide that at the same time, if that's all right, with the agreement on exhibits.

CHAIRMAN MC CASKILL: That's fine.

MR. SCHIFF: The only other comment I wanted to make is I think Senator Hatch's point is very well taken. I don't know if there's a mechanism where part of the record can be in camera or whether we can redact part of the record. It's certainly not our desire and intention to expose people who have been questioned as a part of background checks to any kind of invasion of their privacy.

So if there's a way that we can make sure that the Senate has the information it needs and protect those legitimate interests, we will work with our colleagues and with the committee to do that.

CHAIRMAN MC CASKILL: That's great.

Anything else? All right.

This hearing is adjourned. Thank you all.

(Whereupon, at 6:03 p.m., the hearing was concluded.)

C O N T E N T S

-- continued --

C O N T E N T S (Continued)

E X H I B I T S